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THE AVALON CLUB,
(a corporation),
Appellee,

v.

CITY OF CHICAGO et al.,
Appellants.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a permanent injunction enjoining and restraining defendants (the City of Chicago, its mayor, and superintendent of police) from interfering with or attempting to interfere with or intercept members of the complainant entering the premises occupied by it and from threatening them with arrest and imprisonment if they enter or congregate there, and from attempting so to interfere with or intercept their entering the premises, and from attempting thus to arrest them.

The bill avers in substance that the club was chartered and conducted for the social, intellectual and civic betterment of its members; that it had invested in and maintained in its club premises certain furnishings including billiard, pool and card tables; that it has upwards of 200 members; that defendants began in June, 1924, and have since continued, a course of oppression, annoyance and harassment against the club and its members by raiding the premises and stationing police officers in front thereof to terrify and intimidate its members from enjoying their club membership and privileges, and by threatening to raid the premises and arrest them if they entered the premises;

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258 - 21467

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

THE AVAISON CLUB, (a corporation), Appellee, v. CITY OF CHICAGO et al., Appellants.

MR. JUSTICE BARBER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a permanent injunction enjoining and restraining defendants (the City of Chicago, the mayor, and superintendent of police) from interfering with or attempting to interfere with or intercept members of the complainant entering the premises occupied by it and from threatening them with arrest and imprisonment if they enter or congregate there, and from attempting to interfere with or intercept their entering the premises, and from attempting thus to arrest them.

The bill avers in substance that the club was organized and conducted for the social, intellectual and civic betterment of its members; that it had invested in and maintained in its club premises certain furnishings including billiard, pool and card tables; that it has upwards of 200 members; that defendants began in June, 1934, and have since continued, a course of oppression, annoyance and harassment against the club and its members by raiding the premises and stationing police officers in front thereof to harry and intimidate its members from enjoying their club membership and privileges, and by threatening to raid the premises and arrest them if they entered the premises;

that on various occasions from September, 1924, to July, 1925, police officers entered the premises and arrested a number of the members, breaking into the door on one occasion and mutilating or destroying the billiard and pool tables and other tables therein; that in each instance the members arrested were discharged; that such annoyance, threats and intimidation have caused a loss of membership in the club, and prevented enjoyment of the club property and leasehold of the premises, from which it has suffered and will suffer irreparable damages; that the police officers thus stationed, annoying and intimidating its members and destroying its property have no financial standing and no adequate sums could be recovered at law to repay the club for the loss it will sustain if defendants are not restrained from keeping police officers stationed in said premises and from harassing and annoying its members and destroying its property.

Defendants' joint answer while denying many of the averments of the bill, admitted that members of the police force of Chicago had gone in repeated instances to said premises and arrested persons, but as alleged therein, for the purpose of suppressing disorderly conduct and gambling in the place, and alleged in substance that it was a common gambling house and a public nuisance resorted to by persons of evil character, and that the property so alleged to be destroyed was used for craps and other gambling games, and that complainant had an adequate remedy at law for the acts complained of.

After granting the temporary injunction the cause was referred to a master to report his conclusions of fact and law. The master found that it was a regularly organized social club

that on various occasions from September, 1934, to July, 1935,

police officers entered the premises and arrested a number of the members, breaking into the door on one occasion and mutilating or destroying the billiard and pool tables and other tables therein; that in each instance the members arrested were discharged; that such annoyance, threats and intimidation have caused a loss of membership in the club, and prevented enjoyment of the club property and household of the premises, from which it has suffered and will suffer irreparable damage; that the police officers thus stationed, annoying and intimidating the members and destroying the property have no financial standing and no adequate means could be recovered at law to repay the club for the loss it will sustain if defendants are not restrained from keeping police officers stationed in said premises and from harassing and annoying the members and destroying the property.

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After granting the temporary injunction the cause was referred to a master to report his conclusions of fact and law. The master found that it was a regularly organized social club

with a regular membership and occupied the second floor of said premises as a meeting place for the social intercourse of its members; that the furnishings of said floor consisted mainly of the articles of property described in the bill; that the police department made raids on the place, claiming it was used as a place for gambling, and on these occasions arrested those in the place, charging them with violation of the gambling statutes and ordinances; that in each instance those so charged were discharged; that the officers broke up the furniture of the club, particularly the billiard and pool tables so that it was necessary to have them replaced; that the premises were entered without a writ and the property wantonly destroyed "without a shadow of right;" that the "actual conditions and particular facts" tended to warrant the "suspicion of the police" that gambling was being carried on in the premises, but that the master did not regard the evidence of sufficient weight to base a finding that gambling was actually "conducted there at those times."

The report also recites findings of these significant facts: That the entrance to the premises is up a flight of stairs about half way up which is a door from which a glass panel in the upper part had been removed and replaced by a wire screen, through which one seeking admission could be seen from the head of the stairway from a window about 16 x 16 inches in a door opening into the rooms of the club; that a push button there operates the latch or bolt of the door on the stair; that another push button there when pressed flickers a light over a pool table in the large room; that when a member presented himself at the stair door any member in the room of the club might permit him to enter on presentation of his "credentials" or proper identification;

with a further examination and sampling the same from the
premises at 1000 11th St. for the medical examination of the
body, and the findings of said examination were as
follows: The property described in the bill that the police
examined were made on the place, claiming it was made on a
claim of a building, and on these occasions occurred there in the
place, including some other violation of the building statutes and
ordinances, that in such instances there is charged with the
violation of the statutes of the building of the city,
particularly the building and fire codes so that it was necessary
to have been violated; that the building was erected without a
valid and the property was only occupied without a license of
right, that the "school committee and building board" failed
to enforce the regulations of the building and fire codes
enacted in the building, that the board did not report the
violation of the building codes to the building board, and
thereby "violated" the building codes of the city.

The report also recites findings of these violations
to wit: That the violation of the building is up a flight of
stairs about 200 ft. up which is a door from which a large
amount of the light goes and that the door is closed by a wire
device, which one reaching entrance could be seen from
the top of the building from a window about 10 ft. inches in a
door opening into the room of the door; that a glass door there
enables one to look up into the door on the stairs; that another
glass door there enables one to look up into the door on the stairs
in the large room; that when a window is opened in the
large room one can see in the room of the door which is 20
feet in length of the "entrance" or proper identification;

that on one of the occasions when the officers visited the premises they found a square of canvas marked in the manner generally used in the playing of the game of "craps," and also a curved stick used as a "game keeper's rake," but that they were not in use when found, and that the evidence did not show that they were ever used for gambling by the members of the club or anyone on the premises.

The master found that the stationing of the police in front of the premises and warning persons that they would be arrested and locked up if they entered had the practical effect of closing the rooms of the club and their use by the members, and that while there was sufficient evidence to warrant the suspicion that gambling was being carried on in the premises, the officers had no right to forcibly enter the premises and confiscate and destroy complainant's property, and defendants had no right to station officers at the entrance of the club to warn persons against entering the same or to threaten to arrest or interfere with members who enter.

While the master also found that complainant had an adequate remedy at law for damages for the destruction of its property and the arrest of its members, he found it had none against the conduct of the police, and that their conduct practically prevents the use of the club for lawful purposes, and recommended the injunction that was entered.

Serious consideration is always to be given to the findings of fact by the master who has heard and seen the witnesses. But on reading the evidence we are constrained to differ from his conclusions.

Whatever may have been the purposes for which the club was chartered we think there can be no doubt from the evidence adduced that it was operated for gambling purposes. It had that general reputation in the community, and the police acted upon complaints made against it to suppress violation of the law when they found evidences of its use for gambling. It is needless to say that a club organized for the objects mentioned in complainant's charter would hardly find occasion to exercise such rigid precaution against entrance into its rooms. The mechanism it employed for the scrutiny of one seeking admission is one known to be commonly adopted by gambling houses to prevent sudden entrance by the police or persons likely to expose them. No one could enter unless a person standing at a window at the top of the stairs pressed a button so as to release a bolt on the door in the middle of the stairs, and the lights were so arranged that the person below could be seen by the person above, but the latter could not be seen by the one seeking admission, and where the person who looked down the stairs was located was another push button which operated a flicker light over one or more of the tables, evidently as a warning to those engaged in gaming. Such a signal would hardly be necessary in a lawfully conducted club. A policeman appearing at the door in disguise testified that he was required to show a \$2 bill to qualify him for admission. The police testified to finding there the "crap cloth" and "game-keeper's rake," which the master found were used in "crap games," a game commonly known as a gambling game. While Williams, the president of the club, testified that he never saw the cloth in the premises, such evidence was hardly sufficient to impeach the testimony of the police officers on the subject, which, with

However, we have seen the progress of which the
and the situation of which there was no doubt that the
evidence showed that it was expected the Committee's progress
is that the progress reported in the committee, and the action
action upon committee's main subject is in progress. It is
the fact that the progress of the work is continuing. It
is necessary to say that a club organized for the purpose of
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progress of the progress action on the progress, which with

other evidence, should have been deemed significant and persuasive in determining the character of the club.

On one occasion the police while passing the premises heard a great noise and saw colored men, of whom the club membership was composed, going out of the windows, running over the roofs of adjoining buildings, and out of back doors down the stairway into the alley, where some of them were stopped and taken back. A few were still in the place. While the master excluded the conversations that took place in the premises that might have more definitely explained their conduct, the reason for the confusion, and the character of the place, yet these proceedings could hardly be deemed consistent with the alleged laudable objects of the club. It was on this occasion that the police found the dice or crap cloth on the floor and the "game-keeper's rake." On another occasion they found money on the floor. In their numerous visits there they never saw any cues, balls or racks for the game of billiards. When seeking admission to the premises they usually had to wait fifteen or twenty minutes, and while waiting heard "a lot of running around and fumbling with papers," as was the case when they found a well known "bookmaker" inside, whom they had seen through a window from the outside standing on a table and marking on sheets of paper against the wall, as if keeping "the books."

The applications for membership were oral. A dollar entitled the applicant to the privileges of the club for a month. It appeared from the testimony of some of the "members" that they were laborers, bootblacks and porters, out of work, and one had been out of work for three months.

It is something of a strain upon our credulity to

about fifteen, should have been admitted and permitted
to follow the character of the film.
In the morning the police were passing the premises
found a great noise and saw several men, of whom the chief number
were dressed, going out of the window, leaving the door
of adjoining buildings, and out of back door and the alley.
The chief, whose name of them were stopped and taken back.
A few were still in the place. While the matter unfolded the
investigation found each place in the premises that might have been
deliberately explained their conduct, the reason for the conduct,
and the chief story of the place, but these proceedings were partly
to be made consistent with the alleged immediate objects of the club.
It was on this occasion that the police found the club on stage
claim on the film and the "game-trap" case." On another
occasion they found money on the floor. In their subsequent visits
there they never saw any more, but it looks for the game of
billiards. When seeking admission to the premises they usually
had to wait fifteen or twenty minutes, and while waiting heard a
lot of shouting, running and tumbling with papers, as was the case
when they found a well known "game-trap" inside, when they had
been through a window from the outside standing on a table and
making an attempt to pass against the wall, as it happened "the
police".
The application for admission was made. A letter
called the applicant to the privilege of the club for a month.
It appeared from the testimony of some of the "members" that they
were known, acquainted and partners, out of whom, and one had
been out of the club for some months.
It is something of a strain upon our credulity to

regard the proof for complainant sufficient to establish the innocent character of the club as against the proof of its general reputation, and unmistakable use for gambling. We find no justification in disregarding such significant evidence, indicating that complainant comes into equity with unclean hands.

Whether or not the police broke into the premises on any occasion without a legal warrant is immaterial in this suit if the reputation of the place and facts revealed on their visits justified their presence there and their warnings or threats which the bill seeks to enjoin. Equity will not enjoin police officials from stationing officers near a place where improper practices are going on, to warn intending patrons that the place is disorderly and subject to raid. (Delaney v. Flood, 183 N. Y. 323; Pon v. Wittman, 147 Cal. 280.) No rights of complainants were violated in so doing, and if, as alleged, the presence of the officers there, and their warnings or threats resulted in deterring persons from entering or patronizing the club, it was but an incident to its permitting gambling in the premises, of which it cannot complain. Equity will not allow itself to become a handmaiden to iniquity of any kind.

We are impressed that the bill was filed to protect the use of the club for gambling rather than ^{to prevent} the invasion of any legal rights. From the evidence the police were there in the exercise of police powers given them by law, and the court will not interfere with the duties of public officials by injunction. (Chicago Public Stock Exchange v. McLaughry, 148 Ill. 372, 382; Poyer v. Village of Des Plaines, 123 Ill. 348.)

In a case of very similar circumstances, Banier

Club v. City of Chicago, 239 Ill. App. 662, where other cases bearing on the subject are cited, we held the complainant came into court with unclean hands. Where it thus appears, the party seeking relief will be relegated to ordinary legal remedies for alleged damage to his property. (Pem. Eq. sec. 397, et seq.; Weiss v. Harlihy, 49 N. Y. Sup. 81.)

It is urged as error that the court refused, after the filing of the master's report and before its consideration by the court, to reopen the case to admit evidence to the effect that in the meantime the police had re-entered said premises under a legal process, causing the arrest of Williams, president and apparent manager of the club, who swore to the bill of complaint, and 34 other men in the premises at the same time, all of whom were arraigned in the municipal court, found guilty and fined for occupying a disorderly house, and that among them were known criminal characters. It appears that the court refused to receive the additional evidence, as could properly be done unless there was a re-reference for that purpose. But upon such alleged facts, disclosing the real character of the club and confirming the evidence of the police with regard thereto, - as to the weight of which the master seems to have had some doubt, - and that complainant came into a court of equity with unclean hands, we think a re-reference should have been had. But as we think the evidence adduced was sufficient to show that complainant came into equity with unclean hands, the injunction order is reversed and the cause remanded with directions to dissolve the injunction and dismiss the bill for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, P. J., and Fitch, J., concur.

357 - 31489

MOSES LEVITAN,
Appellee,

v.

M. G. WOLF and
MRS. M. G. WOLF,
Appellants.APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

On December 21 last, we struck the bill of exceptions from the record on appellee's motion, and reserved to the hearing an accompanying motion to affirm the judgment.

All the errors assigned and argued are predicated on the stricken bill. In view of this state of the record we have no other alternative than to affirm the judgment.

While no opinion supporting the said order was filed, or necessary, we may perhaps appropriately state here that the reason for the order was that the time for filing the bill of exceptions expired on April 14, 1926, and that a purported bill was presented to the trial judge on April 1, without the presence of or the giving of notice to appellee or his attorney. It was marked "presented" by the judge and immediately withdrawn by the attorney for appellants, who retained the same in his possession 49 days after the expiration allowed for filing the same, when it was first delivered to the attorney for appellee for his examination, and was not presented to the court for approval until 73 days after the time for filing the same had expired, when the court signed the same and entered an order for its filing nunc pro tunc as of April 1, previous, over appellee's

objection. For such delay on the part of appellants and their counsel the bill of exceptions was stricken in accordance with views regarding such delay when it is the fault of the attorney for the party presenting the bill, and not the fault of the judge or opposing counsel, as expressed in Hall v. Royal Neighbors, 231 Ill. 185; Foley v. Boyer, 153 Ill. App. 613, and Colbert v. Holland Furnace Co., 241 Ill. App. 583.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

• **CONSTITUTION**

* 70-1968

367 - 31499

WOODBRIDGE ORNAMENTAL IRON COMPANY,
a corporation,

Appellee,

v.

SOVEREIGN HOTEL CORPORATION,
a corporation,

Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The sole question presented on this appeal is whether on the proof submitted by plaintiff there could be a recovery on the common counts, the court having instructed the jury that there could be no recovery on the special counts. The court having refused to instruct likewise as to the common counts, defendant offered no evidence. Thereupon the court directed a verdict for \$1000 and interest, on which judgment was entered.

In support of its claim plaintiff made proof of a contract entered into between it and the Albert Hotel & Building Corporation, August 3, 1919, to furnish and install the ornamental and miscellaneous iron work for a hotel building for the sum of \$9025; also of another contract of the same date whereby plaintiff agreed to purchase ten shares of said building company's preferred stock of par value of \$1000, for the sum of \$1000, and pay for the same out of the proceeds of the final certificate of the architect to be issued to plaintiff pursuant to said building contract, and whereby said building company was to repurchase the same from plaintiff on or before two years after the completion of the hotel, which plaintiff testified was November 30, 1922; of a certificate for said ten shares issued in plaintiff's name; of

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a bill of sale executed in July, 1922, from the Albert Hotel & Building Corporation to appellant whereby the former sold and transferred to the latter all of its business property and assets, and whereby the purchaser agreed to assume all the outstanding debts, obligations, contract and liabilities of the seller; of the exchange October 17, 1922, of the stock of said building corporation for a like number of shares of appellant company of like par value; of a tender of the same on March 23, 1922, to appellant, duly assigned by plaintiff, and of a demand on appellant of payment of \$1000, which was refused.

The instruction of the court that no recovery could be had under the special counts was based on the provision of section 8 of the General Incorporation Act "that no corporation shall purchase, acquire or hold, directly or indirectly, the stock of a building corporation." The directed verdict, therefore, must stand, if at all, upon the common counts, either for work and services bestowed, and material for the same furnished in the performance of the building contract, or for money had and received.

But it is urged by appellant that not only is the proof insufficient to sustain a verdict on the common counts, but that plaintiff's affidavit of claim restricted the proof to the special counts. Said affidavit specifically set out and verified the facts set up in the two special counts (other counts having been eliminated by demurrer, as agreed upon by counsel) and contains no averment of fact on which to base a claim under the common counts. It is a settled principle of practice that the respective parties are limited in their evidence to the matters set forth or controverted by the affidavits in support of their pleadings.

(Goddard Pool Co. v. Crown Electrical Mfg. Co., 219 Ill. App. 341

a bill of sale executed in July, 1932, from the Albert Smith &
Billings Corporation to appellant whereby the latter sold and
transferred to the latter all of its business property and assets,
and thereby the purchase price to amount all the outstanding
debts, obligations, contracts and liabilities of the latter at
the exchange dated July 17, 1932, of the stock of said building
corporation for a like number of shares of appellant company of
the par value of a dollar at the time on March 22, 1932, as
appellant, duly assigned by plaintiff, and at a board of appellant
of payment of \$1000, which was received.

The intention of the parties that the corporation should be
and under the special events was found on the provision of section
of the National Corporation Act "that no corporation shall pur-
chase, receive or hold directly or indirectly, the stock of a
building corporation." The director testified, however, that
about, it is all, upon the common sense, either for way and
service business, and material for the same furnished in the
entireness of the building material, on the way and was received.
But it is noted by appellant that not only is the price
transferred to maintain a credit on the common sense, but that
plaintiff's affidavit of claim transferred the goods to the special
company. And plaintiff specifically not only transferred the
goods out of the two special company (common sense building material)
eliminated by plaintiff, as agreed upon by plaintiff) and containing
no element of fact on which to base a claim under the common
sense. It is a settled principle of law that the restrictive
provision was limited in their actions as the business and their
conducted by the plaintiff in support of their knowledge.

(Exhibit 1000 No. 1 - Green Mountain Bldg. Co., Ltd. 1932, 1931)

Kadison v. Fortune Bros. B. Co., 183 Ill. App. 276; Kaina v. Thum, 238 Ill. App. 519-530; Heddis v. Looney, 308 Ill. App. 413; Miller v. Thomas, 300 Ill. App. 125.) It is evident both from plaintiff's affidavit of claim and its proof that it relied on the original two special counts which were eliminated by the court's instruction from the consideration of the jury and not on a claim under the common counts.

But regardless of whether plaintiff was restricted to proof under the special counts, we find nothing in the evidence to sustain the verdict on the common counts. While the contract in evidence showed that plaintiff was to receive for his work, services and material the sum of \$9,000, it was to be upon issuance of architect's certificates. There was no proof that any architect's certificates were issued, or of how much was paid under the contract, or of the value of the labor, work and material, or whether the \$1,000 was paid in cash or deducted from any architect's certificates. While plaintiff would seemingly be entitled to recover what remained to be paid under the terms of the former contract, to recover under the common counts for work, services and material at the price therein fixed plaintiff should have proven that the contract price represented the reasonable value of the work actually performed, what had been paid, and performance of the conditions of the contract, so that it would appear there was nothing to be done except the payment of the money due according to its terms. One of the conditions was that payment was to be made on the issuance of the architect's certificates. While plaintiff proved in a general way that the work was completed, there was no express proof that it was done in compliance with the conditions of the contract. In similar cases where a contract was introduced, it has been held that no recovery can

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It is requested that you advise the Bureau of the results of your investigation.

What a fine day we had today. The weather was just what we needed. We went for a walk in the park and saw many beautiful flowers. The children were very happy and played for hours. We also had a picnic under a big tree. It was a very pleasant surprise. We all enjoyed it very much. The food was delicious and the company was great. We will definitely go back soon. It was a wonderful day and we all had a great time. The children were very happy and played for hours. We also had a picnic under a big tree. It was a very pleasant surprise. We all enjoyed it very much. The food was delicious and the company was great. We will definitely go back soon. It was a wonderful day and we all had a great time.

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be had under the common counts without proof that conditions precedent in the contract have been complied with. (Hart v. Carsley Mfg. Co., 221 Ill. 444; Expanded Metal Fireproofing Co. v. Boyce, 233 Ill. 284; Levin v. Strampler, 194 Ill. App. 229, 301, 303.) A condition precedent here, as in some of the cases cited, was the issuance of architect's certificate.

By the ruling of the court the cause of action was limited to the common counts. Not only was plaintiff's affidavit of claim restricted to the special counts but there was not adequate proof to sustain a verdict under the common counts, either for work, services and material or for money had and received. There was no proof whatever that defendant received money from plaintiff. The proof is to the effect that it received labor and services, for part of which the certificate of stock was issued. Even if the contract for repurchase of the stock is susceptible of a mere intention to extend credit to the Albert Hotel & Building Co. for payment of the final \$1,000 due under the contract, the credit so given does not constitute money had and received.

Accordingly the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

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(continued)

ADVANCE-PARSONS LITE CORPORATION,)

Appellee,)

vs.)

J. W. COHLE,)

Appellant.)

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARRETT DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment as in case of default for want of an affidavit of merits entered against defendant on plaintiff's statement of claim without the hearing of any evidence as to the amount of damages to be assessed.

Alleged error in entering the judgment without hearing evidence is not well taken, as under Rule 18 of the Municipal Court, shown in the bill of exceptions, the court was authorized to do so on the affidavit attached to plaintiff's statement of claim specifying the amount alleged to be due.

We think there was error, however, in striking defendant's amended affidavit of merits and set-off.

The statement of claim as amended claimed a balance of \$925 for moneys advanced to defendant after allowing certain credits, also an account stated, and also set forth the agreement on which the money was advanced, and alleged a refusal to pay the same after demand. The amended affidavit of merits expressly denied owing such a sum, or any sum upon an account stated as set forth in the statement of claim. With respect to the alleged claim under an agreement to so advance money, it pleaded practically what amounted to a confession and avoidance, setting up in effect that while the sums claimed by plaintiff were advanced for defendant's account he was entitled to a salary under the agreement, and was dismissed and discharged from plaintiff's employment before the period of its termination without giving the notice required in

PLAINTIFF'S EXHIBIT

STATE OF NEW YORK
IN SENATE
JANUARY 11, 1911

REPORT OF THE
COMMISSIONER OF THE
LAND OFFICE
IN RESPONSE TO A
RESOLUTION PASSED
BY THE SENATE
JANUARY 11, 1911

REPORT OF THE COMMISSIONER OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE
JANUARY 11, 1911

THE COMMISSIONER OF THE LAND OFFICE HAS THE HONOR TO
ACKNOWLEDGE THE RECEIPT OF YOUR LETTER OF THE 10TH INSTANT

AND IN RESPONSE TO ADVISE YOU THAT THE MATTER
HAS BEEN REFERRED TO THE APPROPRIATE AGENCIES FOR
CONSIDERATION

AS TO THE MATTER OF THE LAND OFFICE, THE COMMISSIONER
HAS THE HONOR TO ADVISE YOU THAT THE MATTER
HAS BEEN REFERRED TO THE APPROPRIATE AGENCIES FOR
CONSIDERATION

ON THE MATTER OF THE LAND OFFICE, THE COMMISSIONER
HAS THE HONOR TO ADVISE YOU THAT THE MATTER
HAS BEEN REFERRED TO THE APPROPRIATE AGENCIES FOR
CONSIDERATION

AT THE SAME TIME, HOWEVER, IN ORDER TO
FURNISH YOU WITH THE INFORMATION YOU REQUESTED

THE COMMISSIONER OF THE LAND OFFICE HAS THE HONOR
TO ADVISE YOU THAT THE MATTER HAS BEEN REFERRED
TO THE APPROPRIATE AGENCIES FOR CONSIDERATION

THE COMMISSIONER OF THE LAND OFFICE HAS THE HONOR
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TO ADVISE YOU THAT THE MATTER HAS BEEN REFERRED
TO THE APPROPRIATE AGENCIES FOR CONSIDERATION

the agreement, and plaintiff thereby became indebted to defendant for a salary in excess of the alleged balance claimed by plaintiff, for which he filed a claim of set-off in apt terms. We think the affidavit of merits and amended claim of set-off, respectively, set forth adequately the nature of the defense and the counter-claim sufficiently specific to require trial of the issues thus raised.

While that portion of the affidavit of merits pleading ultra vires may be vulnerable to a motion to strike, the affidavit so far as it states a legal defense should not have been stricken.

Other purely technical points are raised by appellee which we deem of no real importance or profitable to discuss. Neither the Municipal Court Act nor the rules of that court are intended to make it difficult to present a cause of action or a defense thereto or to secure justice on the merits of the case.

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

The agreement, and the fact that the parties have agreed to arbitrate, for a party is bound by the award unless it is set aside by a court of law. The award is final and binding on the parties, and the parties are bound to comply with it. The award is also binding on the parties as to the merits of the dispute, and the parties are bound to accept the award as final and conclusive. The award is also binding on the parties as to the costs of the arbitration, and the parties are bound to pay the costs of the arbitration. The award is also binding on the parties as to the interest on the award, and the parties are bound to pay the interest on the award. The award is also binding on the parties as to the expenses of the arbitration, and the parties are bound to pay the expenses of the arbitration.

While the parties are bound by the award, they are also bound by the award as to the costs of the arbitration, and the parties are bound to pay the costs of the arbitration. The award is also binding on the parties as to the interest on the award, and the parties are bound to pay the interest on the award. The award is also binding on the parties as to the expenses of the arbitration, and the parties are bound to pay the expenses of the arbitration.

Under the Arbitration Act, the parties are bound by the award as to the costs of the arbitration, and the parties are bound to pay the costs of the arbitration. The award is also binding on the parties as to the interest on the award, and the parties are bound to pay the interest on the award. The award is also binding on the parties as to the expenses of the arbitration, and the parties are bound to pay the expenses of the arbitration.

The Arbitration Act, 1996, provides that the parties are bound by the award as to the costs of the arbitration, and the parties are bound to pay the costs of the arbitration. The award is also binding on the parties as to the interest on the award, and the parties are bound to pay the interest on the award. The award is also binding on the parties as to the expenses of the arbitration, and the parties are bound to pay the expenses of the arbitration.

Arbitration is a process by which the parties to a dispute agree to submit their dispute to a third party, the arbitrator, for resolution. The arbitrator is a person who is impartial and independent of the parties to the dispute. The arbitrator is appointed by the parties to the dispute, and the parties agree to accept the award of the arbitrator as final and conclusive. The award of the arbitrator is binding on the parties, and the parties are bound to comply with it. The award of the arbitrator is also binding on the parties as to the costs of the arbitration, and the parties are bound to pay the costs of the arbitration. The award of the arbitrator is also binding on the parties as to the interest on the award, and the parties are bound to pay the interest on the award. The award of the arbitrator is also binding on the parties as to the expenses of the arbitration, and the parties are bound to pay the expenses of the arbitration.

Arbitration is a process by which the parties to a dispute agree to submit their dispute to a third party, the arbitrator, for resolution. The arbitrator is a person who is impartial and independent of the parties to the dispute. The arbitrator is appointed by the parties to the dispute, and the parties agree to accept the award of the arbitrator as final and conclusive. The award of the arbitrator is binding on the parties, and the parties are bound to comply with it. The award of the arbitrator is also binding on the parties as to the costs of the arbitration, and the parties are bound to pay the costs of the arbitration. The award of the arbitrator is also binding on the parties as to the interest on the award, and the parties are bound to pay the interest on the award. The award of the arbitrator is also binding on the parties as to the expenses of the arbitration, and the parties are bound to pay the expenses of the arbitration.

245 I.A. 612 #1

434 - 31566

SARAH JANE MERLE,
Appellee,

v.

THE NATIONAL CITY BANK
OF CHICAGO, a corporation,
Appellant.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action in trover. Plaintiff alleges that she was lawfully possessed of a certain draft or check drawn by the Security National Bank of Dallas, Texas, to her order for \$3,750 on the defendant; that she casually lost it and the defendant bank found it and converted it to its own use. The jury returned a verdict for plaintiff for \$4,948.75, and, in answer to an interrogatory, found that plaintiff did not endorse "in person" the draft in question.

We reversed a judgment for plaintiff had upon a former trial (236 Ill. App. 347) because no proof was adduced at the trial to show either actual or constructive possession of the draft by plaintiff or that she was the owner thereof or the party for whom it was intended. That defect in the proof was supplied at the last trial, in our opinion.

Reversal is sought on alleged error in rejecting offered evidence, in refusing defendant's motion for an instructed verdict, and on failure to prove a demand.

The plaintiff is the widow of William V. Merle, who died January 28, 1921. The draft or cashier's check in question did not come to her knowledge until after Mr. Merle's death. It was drawn by the Security National Bank of Dallas, Texas,

845 I.A. 613

1934 - 1935

Page 100

GENERAL FROM DEPOSIT

COUNTY OF COOK COUNTY

DEPOSIT TO THE COURT

7.

THE COURT, CITY AND
COUNTY OF COOK, ILLINOIS,
appears.

MR. JUSTICE ALBERT J. HANCOCK, JR. IN CHIEF OF THE COURT.

This is an action in replevin. Plaintiff alleges that

she was lawfully possessed of a certain draft or check drawn by

the Security National Bank of Illinois, Chicago, Illinois, in the name of

the Security National Bank of Illinois, Chicago, Illinois, and that

defendant bank wrongfully and converted it to its own use. The

plaintiff returned a verified complaint for \$4,969.75, and, in

answer to an interrogatory, stated that plaintiff did not intend

"to prove" the draft in question.

It is averred that plaintiff had upon a former

trial (2nd Ill. App. 347) because no proof was adduced at the

trial to show either actual or constructive possession of the

draft by plaintiff at that time was the same as that at the

trial for which it was introduced. That defect in the proof was

corrected at the last trial, in my opinion.

Reverend is sought on alleged error in refusing

to receive evidence, in refusing defendant's motion for an instruction

verdict, and on failure to give a demand.

The plaintiff is the widow of William F. Morris, who

died January 28, 1937. The draft or check in question

did not come to her knowledge until after Mr. Morris's death.

It was drawn by the Security National Bank of Illinois, Chicago,

on defendant and made payable to the order of "Mrs. Wm. F. Merle." It was endorsed in her name by her husband, as the evidence strongly tends to show, and after being deposited in his bank went through the clearing house and was paid by defendant.

It appears that on a social occasion, while Mr. and Mrs. Merle and their friends, Mr. and Mrs. McCourtie, were at a dinner at Hot Springs, Arkansas, in the spring of 1919, Mr. McCourtie told of a successful investment he had made in oil in Eastland County, Texas. Mr. Merle expressed a desire to buy some of the stock. Mr. McCourtie replied that none was for sale, and that he did not want to dispose of any of his. Thereupon Mr. Merle said he did not want it for himself but wanted to buy a few shares for his wife. Mr. McCourtie replied: "Well, if that is the case, I will be sport enough to sell you five shares" at \$1000 a share. On a subsequent occasion Mr. Merle asked McCourtie to issue the stock to him rather than to Mrs. Merle, which he declined to do, saying that the sale must be off or made to Mrs. Merle, whereupon Mr. Merle said that he was joking and that "the sale to Mrs. Merle stands." McCourtie further testified that "evidence of a \$5,000 interest was issued to Mrs. Merle," for which he was paid, and that the said draft or cashier's check was issued "in partial liquidation of the interest of Mrs. Wm. F. Merle," in the proceeds from the oil investment. Said certificate of interest was, under McCourtie's directions, prepared by his agent and forwarded to Mrs. Merle at the business address of her husband. On proof of these facts plaintiff rested.

The above facts were not controverted except as to the handwriting of the endorsement of the draft. The evidence supports the jury's finding that it was not by plaintiff "in person."

on defendant and made payable to the order of "Mrs. W. H. Harris".
It was entered in her name by her husband, on the evidence strongly
tends to show, and after being deposited in his bank went through
the clearing house and was paid by defendant.

It appears that on a social occasion, while Mr. and Mrs.
Harris and their friends, Mr. and Mrs. McGarrick, were at a dinner
at Hot Springs, Arkansas, in the spring of 1919, Mr. McGarrick
told of a successful investment he had made in oil in Oklahoma
County, Texas. Mr. Harris expressed a desire to buy some of the
stock. Mr. McGarrick replied that there was too little, and that he
did not want to dispose of any of his. Thereupon Mr. Harris said
he did not want it for himself but wanted to buy a few shares for
his wife. Mr. McGarrick replied: "Well, if that is the case, I
will be glad enough to sell you five shares" at \$2500 a share.
On a subsequent occasion Mr. Harris asked McGarrick to loan the
money to him rather than to Mrs. Harris, which he declined to do.
Saying that the wife must be all he made in the world.
Mr. Harris said that he was feeling very ill and said to Mr. McGarrick
that he would like to have the money for a few days.
Interest was loaned to Mrs. Harris, for which he was paid, and that
the said draft or cashier's check was loaned "in partial liquidation
of the interest of Mrs. W. H. Harris," in the proceeds from
the oil investment. Said certificate of interest was, under
McGarrick's direction, prepared by his agent and forwarded to
Mrs. Harris at the business address of her husband. On proof of
these facts plaintiff rested.

The above facts were not controverted except on the
questioning of the endorsement of the draft. The evidence
supported the jury's finding that it was not by plaintiff "in person."

Defendant offered in evidence entries in a ledger account kept under Mr. Merle's orders, purporting to show an investment account charging Mrs. Merle with three cash items aggregating \$7,893.50, and a credit item for the amount of said draft "as cash part return of investment." These were not shown to be original entries, nor was it shown that Mrs. Merle had any knowledge of their existence. No legitimate proof was offered making them binding upon her, or that tended to establish an agreement between her and her husband to reimburse him for what he had paid for her oil interest.

Offers were also made of letters to Mr. Merle from Mr. McCourtie to the latter's general manager alluding to the condition of the oil properties, improvements made thereon and receipts therefrom. Plaintiff was in no wise connected with this correspondence, and if it could be said there are any declarations therein adverse to her interest, they were not binding upon her. All of these offers were properly rejected, as well as conversations of her husband when she was not present. We find nothing in the evidence offered or received that legitimately tends to support defendant's theory that the husband bought the interest for his wife with either an understanding or obligation on her part to reimburse him for his outlay before the property became hers. We think the evidence tends to support an absolute gift to her of the property in question and that he held her certificate of interest as her agent, but without any authority on her part to endorse the draft in question.

Under the circumstances, we think there can be no question that the original taking was tortious, (Higgin Mfg. Co. v. Foreman Bros. Banking Co., 222 Ill. App. 29-34; Wizard Oil Co. v. U. S.

[Faint, illegible text]

THE STATE OF NEW YORK, ss. I, the County Clerk of the County of Albany, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the County of Albany.

1964 1965 1966 1967 1968 1969 1970 1971 1972 1973 1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349 2350 2351 2352 2353 2354 2355 2356 2357 2358 2359 2360 2361 2362 2363 2364 2365 2366 2367 2368 2369 2370 2371 2372 2373 2374 2375 2376 2377 2378 2379 2380 2381 2382 2383 2384 2385 2386 2387 2388 2389 2390 2391 2392 2393 2394 2395 2396 2397 2398 2399 2400 2401 2402 2403 2404 2405 2406 2407 2408 2409 2410 2411 2412 2413 2414 2415 2416 2417 2418 2419 2420 2421 2422 2423 2424 2425 2426 2427 2428 2429 2430 2431 2432 2433 2434 2435 2436 2437 2438 2439 2440 2441 2442 2443 2444 2445 2446 2447 2448 2449 2450 2451 2452 2453 2454 2455 2456 2457 2458 2459 2460 2461 2462 2463 2464 2465 2466 2467 2468 2469 2470 2471 2472 2473 2474 2475 2476 2477 2478 2479 2480 2481 2482 2483 2484 2485 2486 2487 2488 2489 2490 2491 2492 2493 2494 2495 2496 2497 2498 2499 2500 2501 2502 2503 2504 2505 2506 2507 2508 2509 2510 2511 2512 2513 2514 2515 2516 2517 2518 2519 2520 2521 2522 2523 2524 2525 2526 2527 2528 2529 2530 2531 2532 2533 2534 2535 2536 2537 2538 2539 2540 2541 2542 2543 2544 2545 2546 2547 2548 2549 2550 2551 2552 2553 2554 2555 2556 2557 2558 2559 2560 2561 2562 2563 2564 2565 2566 2567 2568 2569 2570 2571 2572 2573 2574 2575 2576 2577 2578 2579 2580 2581 2582 2583 2584 2585 2586 2587 2588 2589 2590 2591 2592 2593 2594 2595 2596 2597 2598 2599 2600 2601 2602 2603 2604 2605 2606 2607 2608 2609 2610 2611 2612 2613 2614 2615 2616 2617 2618 2619 2620 2621 2622 2623 2624 2625 2626 2627 2628 2629 2630 2631 2632 2633 2634 2635 2636 2637 2638 2639 2640 2641 2642 2643 2644 2645 2646 2647 2648 2649 2650 2651 2652 2653 2654 2655 2656 2657 2658 2659 2660 2661 2662 2663 2664 2665 2666 2667 2668 2669 2670 2671 2672 2673 2674 2675 2676 2677 2678 2679 2680 2681 2682 2683 2684 2685 2686 2687 2688 2689 2690 2691 2692 2693 2694 2695 2696 2697 2698 2699 2700 2701 2702 2703 2704 2705 2706 2707 2708 2709 2710 2711 2712 2713 2714 2715 2716 2717 2718 2719 2720 2721 2722 2723 2724 2725 2726 2727 2728 2729 2730 2731 2732 2733 2734 2735 2736 2737 2738 2739 2740 2741 2742 2743 2744 2745 2746 2747 2748 2749 2750 2751 2752 2753 2754 2755 2756 2757 2758 2759 2760 2761 2762 2763 2764 2765 2766 2767 2768 2769 2770 2771 2772 2773 2774 2775 2776 2777 2778 2779 2780 2781 2782

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...and a full, well-made, and well-kept, leather-bound book...

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Express Co., 263 Ill. 156-160) and no demand was therefore necessary.

The judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

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130 - 31312

C. F. LOVE & COMPANY,
(a corporation),
Appellant,

v.

ATLANTIC COAST LINE RAILROAD
COMPANY, (a corporation),
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a finding and judgment against the plaintiff in a suit brought by the lawful holder of a bill of lading against the initial carrier in an interstate shipment of strawberries, for damage to the strawberries alleged to have occurred while the same were being transported.

The bill of lading states that the defendant received, at Plant City, Florida, on March 12, 1923, 168 crates of strawberries "in apparent good order," consigned to plaintiff at Chicago, loaded on I. C. Car No. 57774, and to have "full tank refrigeration," which property defendant agrees to carry to its usual place of delivery at said destination, subject to the conditions printed on the back of the bill of lading. Among such conditions is the following: "Except in case of negligence of the carrier * * * (and the burden to prove freedom from such negligence shall be on the carrier * * *), the carrier * * * shall not be liable for loss, damage or delay * * * resulting from a defect or vice in the property." A witness for the plaintiff, who was an experienced buyer and shipper of strawberries, testified that on March 12, 1923, at Plant City,

3451A.612

THE COURT

IN THE COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

IN RE: THE ESTATE OF

JOHN W. BROWN, JR.
(a corporation)
Plaintiff

v.

AMERICAN TRUST AND SAVINGS
COMPANY, (a corporation)
Defendant

IN REPLY TO THE PETITION FOR WRIT OF HABEAS CORPUS

THIS is an appeal from a finding and judgment entered
in a suit brought by the first named party against
the second named party in an intestate estate
of the first named party, the damages to the estate alleged to have
been done while the same were being transported.

The bill of lading states that the defendant received
at New York City, New York, on March 12, 1933, 100 crates of
"American" in apparent good order," consigned to plaintiff
at Chicago, loaded on U. S. Car No. 27776, and to have "this
first transportation," which property defendant agrees to carry
to the usual place of delivery at said destination, subject to
the conditions printed on the back of the bill of lading.

Among such conditions is the following: "Except in case of
negligence of the carrier * * * (and the burden is upon the
first named party to show such negligence shall be on the carrier * * *) the
carrier * * * shall not be liable for loss, damage or delay * * *

resulting from a defect or vice in the property." A witness
for the defendant, who was an experienced expert and subject of
transportation, testified that on March 12, 1933, at New York City,

he saw the shipment of strawberries made in the car mentioned, that he "saw the berries as they were being purchased from the growers" before they were loaded into the car, "knew the condition of the shipment at that time" and that the strawberries were sound and merchantable and of good average quality.

Three witnesses for the plaintiff testified that when the car arrived at the team track in Chicago, on March 17, 1923, the berries were found to be decayed and moldy, overripe and rotten, and that one vent in the north end of the car was open. One of such witnesses testified that the temperature of the car was "warm," being forty-three degrees "in fruit at the door," and that "it was necessary for the temperature to be down to 34 to 38 degrees," to carry strawberries. A witness for defendant said a temperature in the car of from forty to fifty degrees would suffice.

A stipulation of an unusual character was offered in evidence. It was agreed "that if certain witnesses are produced in the trial of the above case on behalf of the plaintiff they will testify" to certain facts stated, and that "if certain witnesses were produced on behalf of the defendant" they would testify to certain other facts stated, but that "either party may introduce further or other evidence in support or in contradiction of the matters set forth herein." The alleged facts so stipulated are that the car above mentioned was a refrigerator car, having ice bunkers which were "filled to capacity with 8400 pounds of ice" on March 10, 1923, at Lakeland, Florida, and "after being so iced," the car was carried ten miles to Plant City and there "placed for loading" on March 10, 1923, but was not loaded until March 12, 1923, "on which date it was delivered

to see the alignment of the structure and in the way of the
load on "and the parties as they were being furnished from the
property" before they were loaded into the car, "then the condition
of the alignment at that time" and that the circumstances were such
and unavoidable and of good average quality.

These elements for the plaintiff testified that when
the car arrived at the town in Chicago, on March 17, 1900,
the parties were found to be damaged and noisy, excessive and
rotten, and that the car was in the same state at the time it was
one of many witnesses testified that the composition of the car
was "very" being forty-three degrees "in front of the car," and
that "it was necessary for the composition to be down to 10 to
15 degrees," to carry the composition. A witness for defendant said
a temperature in the car of 100 to 110 degrees would

be sufficient to cause the composition to be
a temperature of 100 degrees was sufficient to
cause it to be "very" and it was agreed "that it was a witness and
in the trial of the case was on behalf of the plaintiff that
will testify" as certain facts stated, and that "it was a witness
witness were produced on behalf of the defendant" they would
testify to certain other facts stated, but that "other party
any witnesses called to that witness is subject to be
decision of the jury and the parties." The alleged facts on
alleged was that the car above mentioned was a refrigerator
car, having two bunkers which were "filled in capacity with 600
pounds of ice" on March 10, 1900, at Lakeland, Florida, and
"after being so loaded," the car was carried ten miles to Tampa
city and there "placed for loading" on March 12, 1900, but was
not loaded until March 15, 1900, "on which date it was delivered

to the defendant at seven o'clock p. m. for carriage to Chicago," and was then carried by the defendant to Lakeland, Florida, where, at 9:50 p. m. on that day "it was re-iced to capacity with 3400 pounds of ice;" that it was re-iced at Thomasville, Georgia, on March 13, 1923, at 9:35 p. m. "to capacity with 1800 pounds of ice" and at three other places en route to Chicago on succeeding days, each time "to capacity;" that it arrived in Chicago on March 17, 1923, where an inspection was made at 1:40 p. m. of that day and the bunkers were found to be fifteen-sixteenths full of ice; that the car was carried from Plant City to Chicago "with the vents closed and the plugs in."

To meet the evidence of the plaintiff regarding the condition of the strawberries when shipped and when they arrived at Chicago, defendant introduced in evidence in addition to the stipulation mentioned, the reports of the United States Weather Bureau at Tampa. Plant City is twenty-five miles inland from Tampa. These reports show that in January, 1923, there were dense fogs in Tampa on four days of that month, and frost on three days; that in February, 1923, there were dense fogs in Tampa on four days and frost on three days, and that in March, 1923, there was a dense fog in Tampa on March 5th.

Defendant also introduced, over the objection of the plaintiff, the testimony of two farmers living at Plant City, who testified that the weather conditions during January, February and March, 1923, "were generally unfavorable to growing strawberries;" that they had "some fogs" and "some frosts," that "heavy fogs would cause berries not to mature and that the part next to the ground will rot, that such berries are not fit to ship," and that "if berries were

actually decaying on the bottom when shipped they would not carry in good condition to destination and that no efforts of the carriers could keep them from decaying further."

Defendant also introduced the evidence of alleged "expert" inspectors, who like the farmers, did not pretend to have any personal knowledge concerning the condition of the strawberries in this case. In answer to hypothetical questions, these inspectors testified that if the strawberries were sound when shipped and kept properly iced during the voyage, they "would have been in good condition" when they arrived at Chicago five days later, and, conversely, that if the strawberries were not in good condition when they arrived in Chicago "they must have been in poor condition" at the time they were loaded." To one of these questions an objection was sustained, but plaintiff's objection to another was overruled, leaving it uncertain whether the court considered or refused to consider the alleged expert testimony.

Plaintiff contends, and correctly, we think, that it made a prima facie case of negligence when it proved the receipt by the defendant of the carload of strawberries in sound and merchantable condition and their delivery five days later in the condition above described. Defendant's counsel contends that the testimony does not show that the berries were in good condition when shipped. The argument is that the witness who so testified did not say that he knew their condition "when shipped", but said that he saw the strawberries when they were being purchased from the growers before they were loaded and knew their condition at that time. In view of the fact that the witness testified that he saw the berries on March 12, 1923, and that the stipulation shows they were loaded on that day, the argument is without

It was suggested to the Commission that the Commission should be authorized to conduct such investigations as it may deem necessary.

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These investigators realized that if the observations were made
from a ship and not from a fixed point, the observations would
be more accurate. In 1907, the U.S.S. Albatross was sent to
make observations of the Hawaiian Islands. The results of the
observations were published in 1910.

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States.

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Annals of the Entomological Society of America

Figure 10. The effect of the initial concentration of the monomer on the polymerization of 1,3-bis(4-vinylphenyl)propane in the presence of the initiator at 60 °C.

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THE UNIVERSITY OF CHICAGO PRESS

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

any substantial basis in fact.

Having made a prima facie case, it was incumbent upon the defendant to prove freedom from negligence on its part. Aside from the fact that such is the general rule, the bill of lading expressly places the burden in such a case upon the carrier "to prove freedom from negligence." We do not think the evidence as to the condition of the weather at Tampa prior to the shipment was sufficient to overcome the prima facie case made by plaintiff, or to justify the court in finding that the strawberries in question were wet or otherwise unsound or defective when shipped. There is no evidence even tending to prove that the fog and frosty conditions prevailing at Tampa affected the growth of the strawberries in question. The evidence of the alleged experts is wholly incompetent. It invades the province of the court in assuming to give opinions as to ultimate questions of fact involved. As to the icing, the court, sitting as a jury, might well infer from the stipulation that the car was not properly iced when the strawberries were loaded into it at Plant City. The agreement was that the car should have "full tank refrigeration," but the stipulation shows that on the evening of the same day it was loaded and within a few hours after such loading the ice-tanks were nearly half empty.

It follows, we think, that the finding and judgment of the court are manifestly contrary to the preponderance of the competent evidence. After reading over the transcript, however, we are unable to discover any basis in the evidence for a proper assessment of damages. The evidence on this point is meager and unsatisfactory, and would apparently justify a judgment for more than twice the amount of the plaintiff's verified claim; therefore the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P.J., and Barnes, J., concur.

208 - 31340

FRED G. BEAR,
Appellee,

v.

THE MEYERHOOD COMPANY, INC.,
a corporation,
Appellant.APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment in assumpsit for \$2918.23, which amount the court, sitting without a jury, found to be the balance due to the plaintiff from defendant for work done under the terms of a building contract. Defendant appeals, claiming the correct amount due is only \$993.48.

The contract is contained in three letters, all written during the progress of the work of constructing a factory building for defendant, to take the place of an old one formerly used by it. An architect was employed to prepare plans and specifications, but before they were fully completed, plaintiff was employed, at the suggestion of the architect, to construct the boiler room section of the building on a cost and percentage basis. On September 26, 1933, defendant wrote to plaintiff as follows:

"This will confirm our agreement entered into this morning, - namely, to proceed to erect and complete the first story of our building covering the engine room and that part of the lot where the foundations are now being put in, upon the terms of time and material plus ten per cent, this arrangement to cover whatever work has been done on the pier footings and walls along the alley, but not to include the excavating contract. On this work we are to pay you a commission of ten per cent, both labor and material.

"It is understood that if we should elect to complete the balance of the building on time and material basis, your commission shall be five per cent, and in that event you will rebate us five per cent of the commissions paid you on the work you are doing under this present agreement."

Plaintiff replied to this letter on October 13, 1923, stating that defendant's "proposition is acceptable except that it is understood that the items labor and material include liability insurance premiums," and other specified matters not in question, and concluding with the following paragraph:

"It was also agreed that you are to pay all payrolls and invoices for material including my commissions as they become due, as you have been doing in the past."

Under the contract evidenced by these letters, the boiler room section was completed, and defendant paid to plaintiff for doing that work, on statements rendered by plaintiff from time to time, commissions aggregating \$3833.50, at the rate of ten per cent of the cost of the labor and material which was used in its construction. Some of these commissions were paid as late as March, 1924, after a dispute had arisen regarding the amount due to the plaintiff under the second contract hereinafter mentioned.

When the plans and specifications for the whole building were completed, bids were taken by defendant. The lowest bid received for the whole work was \$122,273. Thereupon the defendant wrote the following letter to the plaintiff.

"November 9, 1923.

"Mr. Fred G. Bear, General Contractor,
* * *

"Dear Sir:

"We hereby agree to have you go ahead and complete our concrete building at West Lake Street and Long Avenue according to plans and specifications submitted to you by our architect, Mr. Julius Floto, on the time and

It is understood that if we should elect to purchase the balance of the building on the west corner of the block, we should be required to pay for the same in cash or by check.

Respectfully, yours,
J. H. H. H.

It is understood that the proposition is acceptable except that it is understood that the same labor and material include liability for the same.

and including with the building the same.

It was also agreed that you are to pay all expenses and interest for the same, and that you are to pay the same in cash or by check.

When the contract was made, it was agreed that the same should be paid in cash or by check.

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Respectfully, yours,
J. H. H. H.

Mr. J. H. H. H., General Contractor,
J. H. H. H.

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It is understood that the same should be paid in cash or by check.

material basis, our letter of September 28 and yours to us dated October 18, 1923, to form a part of this contract, except that where we supply heat from our boiler, it is not to be considered expense.

"Your compensation for completing this building is to be 5% commission on the minimum bid we received for its construction - namely, \$122,273.00, which would amount to \$6,113.65. Should the cost of the building run higher than this bid, we are not to be liable to you for commissions on whatever that excess might be unless we deviate from the specifications, incurring a higher cost of construction than called for by the specifications, in which case you are to receive 5% additional commission on the extra cost because of the change in specifications.

"As an incentive for you to finish this building at a less cost than the bid referred to above, we will pay you a bonus of 20% on whatever saving you can show over said proposal on the completed job, it being distinctly understood that you will not in anyway deviate from the quality of material called for in our specifications. We reserve the right to designate the source of supply of any material used.

"In consideration of this contract, you also hereby agree to furnish all necessary supervision covering alterations in our old plant, without compensation.

"It is also agreed and understood that in case any changes are made in the specifications that would increase the cost of the building, such increase will be considered as extra and will in no way affect your bonus referred to above.

"Your acceptance of this will constitute a contract between us."

Plaintiff accepted this proposition and completed the building under its terms. During the progress of this work, defendant paid the cost of labor and materials, and plaintiff's commissions, on statements rendered by plaintiff. Upon completion of the building, plaintiff rendered an account to the defendant under the date of January 9, 1925, showing that the building had been constructed at a cost which was \$17,945.45 less than the minimum bid mentioned in the contract of November 9,

1923, and plaintiff was therefore entitled to a bonus of \$3589.09; that of the "fee per contract" of \$6,113.65, plaintiff had "received to date, \$5281.81," and that after making other debits and credits concerning matters not in controversy, the balance due him was \$3290.84. The finding of the court is for that amount, less a credit of twenty per cent upon the amount of premiums paid for liability insurance.

Defendant claims that it should have received an additional credit of one-half of the \$3833.50 paid to the plaintiff for commissions for erecting the boiler room section of the building. The argument is that inasmuch as the first paragraph of the letter of November 9 states that defendant agrees to have plaintiff "go ahead and complete" the building "on the time and material basis," and that the letters of September 28 and October 18 are "to form a part of this contract," the provision in the letter of September 28 regarding a rebate of "five per cent of the commissions paid" for work done on the first contract, must be read into the contract of November 9. This might be a natural and reasonable construction of the second contract if it were not for the fact that a comparison of the two letters shows clearly that the letter of November 9 fixes the amount of plaintiff's compensation for completing the building, not on the basis of a percentage of the cost of labor and material, but on an entirely different basis. The letter of September 28 states that plaintiff's commission shall be five per cent if defendant "should elect to complete the balance of the building on time and material basis," in which event, part of the commissions paid under the first agreement are to be rebated. The letter of November 9, while apparently and ostensibly electing to complete the building "on time and

material basis," in fact elects to proceed on that basis as to time and material only, and makes a new proposition as to the compensation to be paid to plaintiff. As to the latter feature, there is no election to proceed on the basis stated in the letters of September 28 and October 13, but a different basis is proposed, viz., a fixed commission of five per cent on the amount of the lowest bid defendant had received. On familiar principles, the acceptance of this new proposition made a new contract as to the amount of plaintiff's compensation and thereby the "rebate" provision of the letter of September 28 was abandoned. Under the new contract of November 9, plaintiff's commission could be no more and no less than \$6113.65, no matter what the cost of the "time and material" might be. Evidently defendant sought by this means, as well as by the additional provision for a bonus to guard against any possibility that the total cost of labor and material should be greater than the amount of the lowest bid received. There was also the further provision, not found in the contract of September 28, requiring plaintiff to supervise, without compensation, the "alterations in our old plant," which, the evidence shows, cost more than \$10,000.

For these reasons, we think it is clear that when the plaintiff accepted the contract as proposed in the letter of November 9, a new contract upon the subject of plaintiff's compensation was made which superseded the conditional understanding on that subject expressed in the letter of September 28. It follows that defendant was not entitled to any rebate or credit for any part of the commissions paid to the plaintiff for work done under the first contract. This, as we understand

"material basis," in that there is no basis in fact for the claim that the defendant is entitled to the same and material only, and under a new proposition as to the compensation to be paid to plaintiff. As to the latter, there is no claim to proceed on the basis stated in the letter of September 25 and October 12, but a different basis is proposed, viz., a fixed sum of \$100,000. The amount of the fixed bid submitted and received. As further evidence, the agreement of this new proposition made a new contract as to the amount of plaintiff's compensation and thereby the "basis" provided in the letter of September 25 was abandoned. Under the new contract of September 25, plaintiff's compensation would be no more than \$100,000. No matter what the cost of the "time and material" might be. Defendant sought by this means, in all of the circumstances, provision for a bonus to guard against any possibility that the total cost of labor and material should be greater than the amount of the fixed bid received. There was also the further provision, not found in the contract of September 25, relating plaintiff to supervisory, financial responsibilities, the "allocation in our old plan," which, the evidence shows, was made known to the jury.

For these reasons, we think it is clear that when the plaintiff accepted the contract as proposed in the letter of September 25, a new contract upon the subject of plaintiff's compensation was made which superseded the conditional contract existing on that subject expressed in the letter of September 25. It follows that defendant was not entitled to any rebate or credit for any part of the compensation paid to the plaintiff for work done under the first contract. This, as we understand

the record, substantially accords with the rulings of the trial court.

It is contended that by one clause of the specifications, the final decision of the architect is made binding on both parties. Such a certificate was issued by the architect for \$998.48 after efforts to settle the dispute had failed. The specifications are not abstracted. But in view of this contention we have examined the copy of the specifications which appears in the record, and we are of the opinion that the clause relied upon has no application to questions of the character involved in this suit. The clause quoted in support of the contention is a part of Section 33, and the remainder of that section renders the meaning of the whole section very doubtful. We are unable to find any plain provision in the specifications which makes the architect's certificate conclusive as to the amount due. "To make such a certificate conclusive requires plain language in the contract. It is not to be implied." (Mercantile Trust Co. v. Hensley, 205 U. S. 298, 309; Baylies v. Bent, 185 Ill. App. 437.)

Finding no reversible error in the record the judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

The court, accordingly, cannot say that the trial

was a fair trial.

It is contended that the trial was a fair trial.

The trial was a fair trial.

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The trial was a fair trial.

327 - 31389

GLOSS SHEFFIELD STEEL & IRON
COMPANY, a corporation,
Appellant,

v.

ROOS FOUNDRIES, INC.,
a corporation,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment entered upon a directed verdict for the defendant in an action for damages resulting from the refusal of defendant to accept a quantity of pig iron sold by the plaintiff to the Henry Roos Foundry Co., the defendant's predecessor.

Plaintiff's statement of claim sets forth a contract in the form of a written proposition, accepted by the plaintiff, dated March 31, 1920, bearing the number "C-4764," from the Henry Roos Foundry Company to furnish 650 tons of Gloss pig iron of a specified grade and quality at a specified price per ton f.o.b. cars at plaintiff's furnaces in Birmingham, Alabama, to be shipped in approximately equal monthly quantities during the balance of the year 1920, beginning in April of that year; that pursuant to said contract, plaintiff shipped 97 tons in June, 1920; that in July, 1920, "The Henry Roos Foundry Company was succeeded by the Roos Foundries, Inc., a corporation, who assumed the contract between the plaintiff and the Henry Roos Foundry Company," and plaintiff thereafter made shipments to the defendant in stated amounts in July, August, September and October, 1920, making total deliveries of 449 tons "by the plaintiff to the Henry Roos Foundry

2451.A.812

Page 1

ALBERT HENRIKSEN, JR.,
Plaintiff,
vs.
HENRY ROSS COMPANY, INC.,
Defendant.

THE HENRY ROSS COMPANY, INC., a corporation organized under the laws of the State of California, and the HENRY ROSS COMPANY, a partnership organized under the laws of the State of California, are the defendants in the within captioned cause.

This cause is now a judgment entered upon a verdict rendered by the jury in an action for damages resulting from the breach of contract to supply a quantity of pig iron sold by the defendant to the plaintiff, Henry Ross Company, Inc., the defendant's agent in this matter.

The plaintiff's complaint of breach of contract is in the form of a written specification, accepted by the plaintiff, dated March 21, 1930, bearing the number "H-1700". From the Henry Ross Company Company to furnish the same at least pig iron of a specified grade and quality as a specified price per ton.

As at plaintiff's residence in Alameda, California, to be shipped in approximately equal monthly quantities during the balance of the year 1930, beginning in April of that year; that payment to said contract, plaintiff shipped to same in June, 1930; that in July, 1930, "The Henry Ross Company Company was succeeded by the Ross Foundation, Inc., a corporation, who assumed the contract between the plaintiff and the Henry Ross Company, Inc., and plaintiff thereafter made shipments to the defendant in stated amounts in July, August, September and October, 1930, making total deliveries of 440 tons by the plaintiff to the Henry Ross Company

Company and its successor, Rees Foundries, Inc.;" that thereafter defendant declined to accept further deliveries under said contract and that the market price of such iron at that time was \$14.95 per ton less than the contract price.

The affidavit of merits states that defendant did not at any time assume the contract mentioned but that it purchased certain pig iron from the plaintiff in the open market and not under the contract, which purchases were all paid for.

It will be seen that the sole question of fact involved is whether defendant assumed the contract made with its predecessor. The plaintiff's evidence tends to prove that defendant recognized the contract as being in force and gave at least one specific order for iron to be delivered to it under that contract, referring to it by the number, "C-4764." While it is true that the evidence on behalf of the defendant tends to prove the contrary, nevertheless, it was the duty of the court to deny the motion for a directed verdict. The rule in such cases has been announced many times in this state. Some of the cases are cited in Libby, McNeill & Libby v. Cook, 222 Ill. 206. In that case the court held that if there is no evidence, or but a scintilla of evidence, tending to prove the material averments of the declaration, the jury should be directed to return a verdict for the defendant; but if there is in the record any evidence from which, if it stood alone, the jury could, "without acting unreasonably in the eye of the law," find that all the material averments of the declaration had been proven, then the cause should be submitted to the jury, and the motion to direct a verdict should be denied. In the course of its opinion the court said: "To hold otherwise is to deny to plaintiff the right of trial by jury." Under the authorities in this state, the

Company and its successor, New York, Inc., that there-

after defendant declined to accept further deliveries under
said contract and that the contract was not made at that
time was \$10.00 per ton, less the contract price.

The affidavit of service states that defendant did not do

any thing to cause the contract mentioned but that it purchased certain
oil from the plaintiff in the open market and not under the
contract, which purchase was all paid for.

It will be seen from the facts stated in this affidavit

in relation to the contract between the plaintiff and the defendant,

the plaintiff's evidence tends to prove that defendant purchased

the contract as being in force and good at least one year after

order was made to be delivered as it being that contract, defendant

is it by the number, "C-4704." While it is true that the evidence

on behalf of the defendant tends to prove the contract was made

later, it was the duty of the court to keep the matter for a direct

verdict. The fact in such cases has been announced many times in

this state. One of the cases cited is *187 N.Y. 101* and *102*

is no evidence, or that a principle of evidence, leading to prove

the material elements of the decision, the jury should be

directed to return a verdict for the defendant; but it seems in

the record any evidence from which it is clear that the jury

acted, "without acting unreasonably in the eye of the law," and

that all the material elements of the decision have been proven

then the court should be satisfied as the fact, and the matter so

direct a verdict should be granted. In the course of the opinion

the court said "It is held otherwise in the case of *187 N.Y. 101*

right of trial by jury." Under the authorities in this state, the

question of the preponderance of the evidence does not arise on such a motion. On such a motion, the court cannot weigh the evidence, but must consider only the evidence most favorable to the plaintiff and disregard all the countervailing evidence.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

242 - 31374

J. H. McCABE,
Appellee,

v.

HARRY D. BENDER,
Appellant.APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

On defendant's motion a judgment by confession against him for rent was opened and he was given leave to file an affidavit of merits, the judgment to stand as security. He filed such an affidavit, and after a trial without a jury the court reduced the amount of the judgment and confirmed it as so reduced. Defendant appeals. There is no bill of exceptions or stenographic report or certified statement of facts in the record.

Defendant contends that the judgment is void because, he says, it was entered on the authority of an invalid power of attorney in the lease, and because the cognovit goes beyond the terms of the power by undertaking to agree that no bill in equity shall be filed "to interfere in any manner with the operation of said judgment."

There is no error in either respect. The same objection to the validity of a similar power of attorney was held untenable in Fortune v. Bartholomae, 164 Ill. 51. The alleged "departure" has no effect whatever in this case and is wholly immaterial. Moreover, both of these objections to the original judgment were waived by defendant by appearing in the trial court and asking for and obtaining a trial on the merits.

Page 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN SENATE
JANUARY 10, 1951
U.S. SENATE
JANUARY 10, 1951

MR. JUSTICE WILLIAM BREWER, JR. OF THE COURT.

On September 1, 1949, the Court rendered its decision in the case of *United States v. Belmont*, 332 U.S. 38, 68 S.Ct. 123, 84 L.Ed. 1331. The Court was divided 5 to 4. The majority opinion was written by Mr. Chief Justice Warren, and the dissenting opinion by Mr. Justice Black. The majority opinion held that the President has the authority to accept the surrender of enemy property without the aid of Congress. The dissenting opinion held that the President's authority is limited by the Constitution. The Court's decision in *Belmont* has been widely criticized. Some have argued that the Court's decision is a usurpation of the power of Congress. Others have argued that the Court's decision is a necessary and proper exercise of the President's executive power. The Court's decision in *Belmont* is a landmark case in the history of the separation of powers. It has been cited in many subsequent cases and has been the subject of much scholarly discussion.

Belmont contends that the judgment is void because, he says, it was entered on the authority of an invalid power of attorney in the case, and because the attorney's power beyond the terms of the power by undertaking to agree that he still in equity shall be filed "in interest in any manner with the operation of this judgment."

There is no error in either respect. The same question as to the validity of a similar power of attorney was held untenable in *United States v. Belmont*, 332 U.S. 38. The alleged "deception" has no effect whatever in this case and is wholly immaterial. Moreover, both of these objections to the original judgment were waived by respondent by appearing in the trial court and asking for and obtaining a trial on the merits.

It is urged that there was an eviction. On the record before us we must presume that if there was any evidence on that subject it was insufficient to sustain that alleged defense.

The judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

261 - 31393

NEW ENGLAND BALED SHAYINGS
COMPANY, a corporation,
Appellee,

v.

EDMOND H. STROUD,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

In a fourth class action in contract, the plaintiff recovered a judgment for \$810.50 upon a statement of claim which alleges that the plaintiff's claim is for a balance due for commissions on the sale of machinery to a concern in Suncook, New Hampshire, together with interest thereon. The sole defense set forth in the affidavit of merits is "that plaintiff, under its corporate powers, was not authorized to engage in selling goods on commission, and its acts thereabouts are ultra vires." There was a trial without a jury and a finding and judgment for the plaintiff, from which the defendant appeals. No brief has been filed by the plaintiff.

Whether the defendant had the corporate power to sell goods on commission depends on the evidence, and the evidence is not properly preserved. The case was tried before Judge C. B. Adams, of the City court of Canton. The judgment was entered April 10, 1926, and defendant was given sixty days in which to file a bill of exceptions. The record shows that no bill of exceptions was filed within that time and no order was entered extending the time. On June 9, 1926, the last day of the sixty days allowed, a bill of exceptions was

1. The first part of the document is a list of names and addresses, which are arranged in two columns. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list includes names such as "John Smith", "Mary Jones", and "Robert Brown", along with their respective addresses in various cities and states.

[illegible]

Another fact which was pointed out by the Plaintiff's attorney was that the Defendant had been found guilty of fraud in the past.

was entered concerning the time. On June 5, 1934, the June 2nd bill of exception was filed within that time and no order in which to file a bill of exception. The record shows that was entered April 10, 1934, and judgments were given sixty days later, at the City Court of London. The judgment was given on commission demands on the witness, and the witness is not properly preserved. The same was filed before

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presented to Judge Charles F. McKinley, of the Municipal court, who marked it: "Presented to the undersigned in open court in the absence of Judge C. B. Adams from the City of Chicago, Cook County, Illinois, this 9th day of June, 1926." On July 14, 1926, an order was entered that "the Bill of Exceptions herein presented be and it is hereby ordered approved and filed nunc pro tunc as of June 10, 1926," and it was so filed. Under repeated decisions in this state, and especially under the decision in The People v. Rosenwald, 266 Ill. 548, 555, a bill of exceptions so certified and filed is not properly a part of the record. For this reason, if for no other, the judgment must be affirmed; for the alleged defense of ultra vires does not appear in the common law record.

However, in view of the fact that no brief has been filed by plaintiff, we have looked into the evidence contained in the purported bill of exceptions and we find that plaintiff is a New York corporation whose chartered powers are "to manufacture, buy, sell and deal in baled shavings and any and all other kinds of merchandise, and to do all acts and things and transact all business necessary or proper in connection with the aforesaid purposes, or incidental thereto, or in anywise connected therewith;" that the machinery which was sold for the defendant by the plaintiff was designed to convert shavings into what is known as wood flour, and it is fairly inferable from the correspondence that the sale of such machinery was one of the methods employed by plaintiff to extend its trade in baled shavings. Therefore, we think the transaction in question was not ultra vires. Transactions of the same character were sustained in Kraft v. West Side Brewery Co., 219 Ill. 205, and Central Lumber Co. v. Kelter, 201 Ill. 503.

For the reasons stated the judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

277 - 31409

AUGUST F. DORN,
Appellant,
v.
JOSEPH F. KYLE,
Appellee.

} APPEAL FROM CIRCUIT
} COURT, COOK COUNTY.
}

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks to reverse a judgment for the defendant in a personal injury case entered upon a directed verdict at the close of the plaintiff's case. Plaintiff claims that his evidence makes out a case against the defendant and that the questions of contributory negligence and assumed risk involved were questions of fact to be determined by the jury. Defendant disputes this claim and contends that there is no proof of negligence on the part of the defendant.

The plaintiff was the only witness. He testified to the following facts. Defendant owned a sailing boat fifty-five feet long from stem to stern, twelve or fourteen years old, schooner rigged, with two masts and an auxiliary gasoline engine. The main mast was sixty-three feet high and the deck of the boat was about three feet above the water. Plaintiff had "sailed boats for fifty years," thirty-three years "as master of freight boats." Some of these freight boats had gasoline engines, but plaintiff testified he knew nothing about their operation and never attempted to operate one. In the winter of 1920 or the spring of 1921, defendant hired plaintiff "to sail the boat for him, be sailing master." At that time the boat was in dry dock and the masts were out. Defendant told plaintiff to "put the boat in shape for sailing."

which plaintiff proceeded to do. He hired help, put the masts in, and "fitted her out," including painting, scraping, a new set of sails, and the purchase and installation of a large amount of equipment, such as a binnacle head, wood blocks, pulleys, compass, awnings, cleats for belaying and running gear, etc. The cost of these repairs exceeded \$2000. Thereafter plaintiff sailed the boat, "and everything went all right that summer." During that summer (1921), he "saw there was nothing to make the boat fast, to snub the boat going into a harbor," and spoke to defendant "about having cleats put on for mooring purposes." Defendant replied: "We will have them done some time;" and plaintiff "did not speak to him about it after that." Plaintiff testified that two of such cleats were required, one on each side of the boat, and they were never put in.

On September 17, 1922, plaintiff was instructed by the defendant to take the boat up the Chicago river to its winter mooring. The crew consisted of plaintiff, the captain, and Shannon, the cook, who also acted as the engineer. Plaintiff steered the boat, and Shannon operated the engine. The current in the river was then about one and one-eighth miles an hour. They were going with the current at a speed of four miles an hour. They passed through the Michigan avenue bridge in safety. As they approached the State street bridge and were 200 feet from it, plaintiff noticed that the bridge did not open. He called to Shannon to "back her, back up." Shannon "turned the lever over to back," and the engine stopped. Then he tried to start it and said he "couldn't make it go." The boat was moving towards the bridge. Plaintiff steered alongside a lighter in the river and told Shannon to throw a line to it. Shannon attempted to do so but failed. Thereupon plaintiff

which plaintiff proceeded to do. He hired help, but the money
he, and "littered her out," maintaining painting, carrying, a new
set of sails, and the purchase and installation of a large
amount of equipment, such as a binocular beam, wood blocks,
pulley, compass, sextant, dials for painting and turning
gear, etc. The cost of these repairs exceeded \$2000. There-
after plaintiff called the boat, "and everything went all right
this summer." During this summer (1921), he "now there was
nothing to make the boat fast, so when the boat began to
leak," and when it began to leak, "he was in the
moving position." "We will have some more
some time," and plaintiff "is not going to let it be
that." Plaintiff testified that two of such leaks were repaired,
one on the side of the boat, and they were never put in.
On October 17, 1921, plaintiff was contacted by the
defendant to take the boat up the Illinois river to the winter
storage. The boat consisted of plaintiff, the engine, and
Shannon, the boat, who also acted as the engineer. Plaintiff
started the boat, and Shannon operated the engine. The engine
in the river was then about one and one-half miles in
They were going with the current at a speed of four miles an
hour. They passed through the Illinois avenue bridge in early
as they approached the State street bridge and were 200 feet
from it, plaintiff noticed that the bridge was not open. He
called to Shannon to "back her, back her." Shannon "turned the
lever over to back," and the engine stopped. Then he tried to
start it and said he "couldn't make it go." The boat was moving
towards the bridge. Plaintiff noticed a light in
the river and told Shannon to "turn a line to it." Shannon
attempted to do so but failed. Shannon plaintiff

seized another line and threw it to a man on the lighter, who made his end fast, and plaintiff then made a turn of his end of the rope around a turnbuckle on the rigging of the boat. The rope was not long enough to tie, and he called for a longer rope. The deck of the lighter was five feet higher than the deck of the boat and the movement of the boat caused the line to "jump" over the turnbuckle, and two of plaintiff's fingers were caught and crushed while plaintiff was holding the end of the short rope. When the boat was finally secured, one of the masts was within a foot of the State street bridge.

The amended declaration consists of four counts. The first count charges that defendant failed to exercise reasonable care to make the cleats on the boat "safe, secure and free from defects," of which defendant had knowledge. The second count charges that the engine was defective and the boat was without appliances "to make it safe for its crew in the handling thereof." The third count charges that plaintiff was injured because of dangerous defects "in equipping" the boat and in failing to make the fittings and appliances safe for the use of the crew. The fourth count charges negligence in not having four employees in the crew instead of two.

We are constrained to hold that there is no evidence fairly tending to prove the material averments of the declaration. Conceding that the evidence tends to prove that plaintiff was exercising reasonable care under the circumstances, we fail to find any evidence of actionable negligence on account of any of the defects mentioned in the declaration. The mere fact that the engine stopped when the dock tried to reverse it does not tend to prove that the engine was defective, and there is no other evidence supporting that averment. Nor is there any evidence

tending to prove that if mooring cleats had been properly installed on the boat at the time of the accident, they could have been used by the plaintiff or the cook in their efforts to tie up the boat to the lighter on the occasion in question. The evidence to the effect that fifteen or eighteen months before the accident defendant said he would put mooring cleats in "some time," does not tend to prove that plaintiff intended or that defendant understood that plaintiff was then complaining of the want of mooring cleats for the purpose and with the intention of quitting his employment if they were not installed, and we think all reasonable minds must agree that plaintiff continued in his employment very much longer than a reasonable time after the "promise to repair" was made. This being true, plaintiff assumed the risk of injury resulting, if it did result, from the mere absence of the mooring cleats.

In The Morden Frog & Crossing Works v. Price, 228 Ill. 248, it was held that by a promise to repair a defect in machinery complained of by a servant, a new relation is created whereby the master impliedly agrees that for a reasonable time following the promise, the servant shall not be held to have assumed the risk of continuing at work, but that in order to create that relation the servant must have complained of the defect because of apprehended danger to himself, and must have intended to quit work unless the defect was repaired; and that the burden of proving that the master's promise to repair induced him to remain at work is upon the servant.

In Illinois Steel Co. v. Mann, 170 Ill. 200, it was held that a servant may continue in the master's employment a reasonable time after notice or complaint to the master of defects in machinery or appliances, or danger in the

surroundings of the servant, which increase the hazard of the latter's employment, and a promise by the master to repair the defects or remove the danger, and that the reasonable time contemplated by this rule is, such time as would be reasonably sufficient to enable the master to make the necessary repairs or remedy the defects complained of. In Gunning System v. Lapointe, 212 Ill. 274, the court cites and quotes from Illinois Steel Co. v. Mann, *supra*, and adds the following: "If the promise to repair is without fixing the time within which the repairs shall be made, the servant may continue the work for a reasonable time, taking the character of the defect into consideration, within which the repairs could or ought to be made, and after the expiration of such reasonable time within which to make the repairs, if they are not made and if the defects are open and known to the servant and no new promise to repair is made and the servant continues the work, he assumes the risks incident to the defects of which he complained." This sentence applies with peculiar force to the facts shown in this case, and, we think, is decisive here.

The trial court did not err in directing the verdict and the judgment is therefore affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

305 - 31437

SHERMAN STATE BANK,
a corporation,

v.

CROFTS & REED CO.,
a corporation, et al.

B. B. KOZLOWSKI,
Petitioner,
Appellee,

v.

S. W. HAREMSKI,
Respondent,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This appeal is from an order of the Circuit court, entered in a receivership proceeding, adjudging the appellant, S. W. Haremski, one of the two receivers, guilty of contempt of court for failing to pay over to appellee, B. B. Kozlowski, the other receiver, the sum of \$29,622.07 as theretofore ordered by the court, being moneys received by appellant, while acting as receiver, for which he refused to account. By agreement, the record in this appeal was consolidated with the record in 31438, which is an appeal from that part of the original order which finds and adjudges appellant guilty of contempt for appropriating that sum of money to his own use and refusing to account for the same. In both cases the records are praecipe records only. In neither is there any certificate of evidence. These records disclose the following facts:

In May, 1925, appellant and appellee were appointed receivers of the Crofts & Reed Company and the Polonia Soap

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MR. JUSTICE VIVIAN DELIVERED THE OPINION OF THE COURT.

THIS CASE IS ONE OF THE MANY CASES

IN WHICH THE COURT HAS BEEN CALLED UPON TO

RECONSTRUCT THE RECORD OF A BUSINESS

AND TO DETERMINE THE RIGHTS OF THE PARTIES

TO THE PROPERTY OF THE BUSINESS.

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Company, corporations, upon a bill filed by the Sherman State Bank, a creditor, seeking to wind up the affairs of said corporations and to distribute their assets among their creditors. Appellant was then the president of the Crofts & Reed Company. Both receivers qualified, and an order was entered allowing them to continue the business of the Crofts & Reed Company. So far as appears from the record, no final decree has been entered in that proceeding.

On November 27, 1925, appellant was suspended from duty as receiver, but was not discharged. On December 17, 1925, appellee filed his petition against appellant and two of the receiver's employees, stating, in substance, that at the time the receivers were appointed, said corporations were engaged in the manufacture and sale of toilet waters in addition to their regular business of manufacturing soaps and perfumes; that they had a permit "allowing the withdrawal of alcohol not exceeding 2200 gallons in any one month;" that prior to the receivership, the sales of toilet waters had been very large, while thereafter, they were very small; that in November, 1925, petitioner, on the advice of counsel, broke into appellant's desk and discovered a private set of books kept by appellant, which disclosed that from the beginning of the receivership to that time, "the corporations" had purchased 12,374 gallons of alcohol, out of which "said corporations" had manufactured and sold 19,134 gallons of toilet water. The petition alleges that this was done without the knowledge of the petitioner, who afterwards learned that appellant had reported these withdrawals to the government not as receiver, but "as president of said corporations," and that he had secured the aid of the two employees mentioned by paying them large salaries and promising to divide the profits; that all

Company, corporations, upon a bill filed by the American State Bank, a creditor, seeking to wind up the affairs of said corporation and to distribute their assets among their creditors. The bill was then the president of the Credit & Bond Company. This receiver admitted, and he asked was related to the fact that in winding the business of the Credit & Bond Company, in the as appears from the record, no final decree had been entered in the receiver's office.

On November 17, 1905, appellant was subpoenaed to appear as receiver, but was not discharged. On December 17, 1905, appellant filed his petition against appellant and two of the receiver's employees, stating, in substance, that at the time the receivers were appointed, said corporations were engaged in the manufacture and sale of toilet water in addition to their regular business of manufacturing soap and perfume; that they had a permit "allowing the withdrawal of alcohol was exceedingly large gallons in any one month" that prior to the receivership, the sales of toilet water had been very large, while thereafter they were very small; that in November, 1905, petitioner, on the advice of counsel, broke into appellant's safe and discovered a private set of books kept by appellant, which disclosed that from the beginning of the receivership to that time, "the corporations" had purchased 18,774 gallons of alcohol, out of which "said corporations" had manufactured and sold 19,134 gallons of toilet water. The petition alleges that this was done without the knowledge of the petitioner, the affidavit sworn that appellant had reported these withdrawals to the government and as receiver, but "as president of said corporations", and that he had secured the aid of the two employees mentioned by paying them large salaries and promising to divide the profits; that all

of such alcohol was received and all such toilet waters were shipped out, "through the shipping door of the receivers," but no report of the same was made to petitioner or entered on the receivers' books; that the fair market price of the toilet waters so manufactured and sold amounts to over \$57,000; and the cost price of the alcohol to about \$10,000; and that upon making these discoveries, appellee made a demand upon appellant for an accounting, which was refused. The petition alleges that all this constituted a fraud on the court and prays that a rule be entered requiring the respondents to show cause why they should not be punished for contempt of court, and that upon a full hearing, they be required to "make full restitution." Later, the petition was dismissed as to the two employees.

Appellant filed a demurrer and answer (in the same document) to this petition. The alleged causes of demurrer are that the petition is insufficient because it does not sufficiently set forth the facts, to require respondent to answer the same in detail, and that it appears from the face of the petition that the petitioner is seeking thereby to reach alleged gains "arising from a course of conduct which is unlawful" under the Federal statute and "against good morals and proper judicial procedure."

The answer admits the appointment of the receivers, that they duly qualified, and that respondent was the president of the Crofts & Reed Company, but denies that either of the corporations mentioned "were largely engaged" in the manufacture and sale of toilet waters prior to the receivership, denies that "said corporations" were possessed of a permit allowing the withdrawal of alcohol, but alleges the fact to be that the Crofts & Reed Company had a permit for the withdrawal of denatured alcohol, and the other company had a permit for

the use of a small quantity of pure alcohol, and that "only denatured alcohol was used by the Crofts & Reed Company and not pure alcohol;" alleges that neither appellee nor appellant, as receiver, had any legal authority to use denatured or pure alcohol; alleges that appellee is a licensed pharmacist and chemist of many years' experience and the owner of a drug store and a manufacturer of patent medicine, and was fully informed as to the character of the business conducted at the plant of the Crofts & Reed Company; and alleges that the books taken from appellant's desk were his own private memoranda, and he demands the return thereof, denying that such records show "the purchase of raw products and the manufacture of toilet waters and the sale thereof by this respondent, either in his capacity of receiver, or president, or otherwise." The answer also denies that "either or both of said corporations" purchased 12,374 gallons of alcohol "from the beginning of the receivership to November 23d," and denies that "either or both" manufactured "a total of 19,374 gallons of toilet water" during that period. The answer then states that respondent refuses "to answer certain matters referred to in said petition" upon the ground that such matters, "which are not answered herein, relate to and concern transactions which might be held to be crimes and misdemeanors under the laws of this State and of the United States, which, if answered, might tend to incriminate this respondent." The answer concludes with a general denial of any indebtedness to the corporations or to appellee and of the jurisdiction of the court, and of the allegation that his conduct constitutes a contempt of court or a fraud upon the court.

This answer is verified by the affidavit of appellant stating that "as to certain matters set forth in said answer, he has personal knowledge of such matters,

the use of a small quantity of pure alcohol, and that "only
distilled alcohol was used by the Groves & Reed Company and not
pure alcohol," although the latter applies not equally to
testimony. And any legal authority is not concerned at this
alcohol; although the latter applies in a technical sense, and
concerns it not, but the question is the point of a legal sense
and a manufacturer of patent medicine, who was called in evidence
to the character of the substance mentioned in the list of the
Groves & Reed Company; and although the latter is not
applicant's list were the two parties concerned, and he testified
the nature thereof, stating that such matters were "the substance
of the process and the manufacture of toilet water and the sale
thereof by this respondent, either in his capacity of receiver,
or president, or otherwise." The answer also denies that "either
or both of said corporations" purchased in 1875 gallons of alcohol
"from the following of the respondent as respondent," and
denies that "either or both" manufactured "a total of 15,374
gallons of toilet water" during that period. The answer then
states that respondent's return "is correct in all matters referred
to in said petition" upon the ground that such matters, "which
are not answered herein, relate to and concern transactions which
might be held to be crimes and misdemeanors under the laws of
this State and of the United States, which, if answered, might
tend to incriminate this respondent." The answer concludes with
a general denial of any indebtedness to the corporations or to
applicant and of the jurisdiction of the courts, and of the
allegation that the conduct constitutes a contempt of court
or a fraud upon the court.

This answer is verified by the affidavit of
applicant stating that "as to certain matters not truly in
said answer, he has personal knowledge of such matters."

and he therefore says that such matters and things are true in substance and in fact," and "that as to the matters and things which are stated to be matters and things concerning which this affiant has certain information and belief, that he believes such matters and things to be true as therein stated."

The records further show that on March 3, 1936, evidence was heard by the court upon the petition of appellee "and the plea thereto of the said respondent," and after arguments of counsel an order or decree was entered which finds the facts specifically and at length substantially as alleged in the petition, including the appointment of the receivers, the withdrawal of 12,374 gallons of alcohol and the delivery of the same to the plant of the Crofts & Reed Company, under the authority of the respondent, S. W. Haremski, the reports by him to the United States government in his name as president of the Crofts & Reed Company, the discovery by the co-receiver of these facts and of the books showing the purchase of the alcohol and the manufacture therefrom and sale of 19,134 gallons of toilet waters, which the court finds were the property of the Crofts & Reed Company, that he received two dollars a gallon for the toilet waters sold, for which he declines to account, and when asked by the court to account for the disposition of the alcohol, refused to answer on the ground that his answers might incriminate him, and that the amount of the proceeds received by him after deducting the amount paid for the alcohol was \$29,622.87; and orders and decrees that the respondent pay over that sum of money to his co-receiver within ten days from the date of the entry of the order. The order further finds appellant guilty of contempt of court for refusing to account for the disposition of said alcohol and said toilet waters, for appropriating to

and no reference was made to the fact that the evidence in substance and in fact, and that as to the matters and things which are stated to be matters and things concerning which the witness has certain information and belief, that he believes such matters and things to be true as therein stated.

The records further show that on March 24, 1930, was dated the writ by the court upon the petition of appeal and the file thereto of the said respondents, and after argument of counsel on order of the court was entered which finds the facts specifically and in detail substantially as follows in the petition, including the allegations of the petition, the same being at 14,475 pages of the record and the balance of the same to the point of the writ a new copy, under the following of the respondents, J. J. McDonald, the record of the said United States Government in its name as defendant of the writ a new copy, the discovery of the co-respondent of these facts and of the books showing the purchase of the record and the material, photostatic and sale of 10,155 pages of record which, which the court finds were the property of the United States Government, that he received two million a million for the said records sold, for which he received no account, and when asked by the court to account for the disposition of the records, refused to answer on the ground that the records were confidential and that the amount of the records received by him after deducting the amount paid for the records was \$25,000.00; and that and because that the respondents pay over that sum of money to his co-respondent within ten days from the date of the entry of the order. The order further finds appellant guilty of contempt of court for refusing to account for the disposition of said records and sold said records, for conspiring to

his own use the moneys received from the sale thereof, and for withdrawing alcohol under the permit of the Crofts & Reed Company without the knowledge of the co-receiver or the permission of the court; and for such contempt of court, appellant is committed to the common jail of Cook county for ninety days, unless sooner discharged by due course of law. It is from the latter portion only of this order or decree that an appeal was prayed by Haremski. That appeal has been docketed in this court^{as} No. 31438. No appeal was prayed from that part of the order or decree which directs appellant to pay over to his co-receiver the sum of \$29,622.07.

The records further show that on April 20, 1926, appellee filed another verified petition stating that more than ten days had elapsed since the entry of the decree of March 3, 1926, and that Haremski had failed and neglected to pay the money ordered to be paid by that decree, and asking for a rule on him to show cause why he should not be punished for contempt of court for failing to do so. A rule was entered in accordance with the prayer of the petition, returnable in ten days. On the tenth day Haremski filed a special demurrer, which was later overruled; and after being ruled to answer the petition, he filed a sworn answer denying the power of the court to grant the relief prayed for, and asserting, in substance, that the court had no jurisdiction to compel him by contempt proceedings to pay the amount of a money judgment against him (which, he says, is the nature of the order) because of the constitutional provisions against imprisonment for debt and trials by jury. His answer also alleges that no execution has been issued against him, that he has no property or assets "which are the property of the Crofts & Reed Company or the Polonia Soap Company," and that he is unable to comply with said decree

his own wife's money received from the sale thereof, and for
claiming himself under the benefit of the Credit & Trust Company
without the knowledge of the co-defendant or the permission of the
court; and the court accordingly at once, judgment is rendered so
that neither of them shall receive any more money, unless some
arrangement by the course of law. It is from the latter portion
only of this order as stated that an appeal was taken by
defendant. That appeal has been decided in this court, and
the appeal was argued from time to time of the order on several occasions.
The defendant appeals to pay over to his co-defendant the sum of
\$100,000.

The records further show that on April 18, 1906, the
first witness testified that during the month of March 3, 1906, and that
defendant came the entry of the house of March 3, 1906, and that
defendant had failed and neglected to pay the money ordered to be
paid by that decree, and asking for a rule on him to show cause
why he should not be committed for contempt or sent for trial
to the court. A rule was entered in accordance with the prayer of
the petition, returnable in ten days. On the tenth day defendant
filed a special demurrer, which was later overruled; and after being
called to answer the petition, he filed a sworn answer denying the
facts of the count he sought to grant the relief prayed for, and asserting
in substance, that the court had no jurisdiction to compel him to
conform proceedings to pay the amount of a money judgment against
him (which, he says, is the nature of the order) because of the
constitutional provisions against imprisonment for debt and trials
by jury. His answer also alleges that no execution has been
issued against him, that he has no property or assets "which are
the property of the Credit & Trust Company or the National Bank
of Chicago," and that he is unable to comply with said decree

because he has no real or personal property, over and above his exemptions, "which he can apply to the payment of the said sum of \$29,622.07."

On June 9, 1926, an order was entered stating that the cause came on to be heard upon the rule to show cause and the answer of the respondent, that respondent did not appear in court in person, but appeared by counsel, that the court heard the arguments of counsel, "and no evidence being offered by the petitioner or the respondent * * * and the court having examined the rule heretofore entered against the respondent S. W. Haremski and the answer of said S. W. Haremski to said rule * * * and having expressed the willingness of the court to hear witnesses on behalf of the respondent and none being offered," the court finds that respondent has not complied with the order of the court entered on March 3, 1926, directing him to pay to his co-receiver \$29,622.07, and that he fails and refuses to pay the same and stands in defiance of the order of the court; therefore, the court finds that respondent is guilty of wilful contempt of court for refusing to pay the same as theretofore ordered, and orders him committed to jail until he shall pay to his co-receiver that sum of money, as required by the order of March 3, 1926, or until he is otherwise discharged from imprisonment by due process of law. From that order Haremski also appealed, and that appeal is docketed in this court as No. 31437.

It is first contended that the order or decree requiring appellant to pay over to his co-receiver the proceeds of the sale of toilet waters, and also the later order committing him to jail until he shall comply with the first order, violate the section of the constitution prohibiting imprisonment for debt. It is a sufficient answer to this contention to say that by appealing to this court and assigning errors on other

... he was not at all in financial straits, and that when he was asked to pay the amount of the judgment, he was able to do so.

On June 3, 1924, an order was entered stating that the order was to be paid upon the date of the order. The answer of the respondent, that respondent did not object to the order in person, but appeared by counsel, that the court found the arguments of counsel, "and no evidence being offered by the respondent to the contrary" * * * and the court having examined the exhibits introduced in support of the respondent's answer, and the answer of said J. V. Hruschka to said order * * * and

having expressed the willingness of the court to hear witnesses on behalf of the respondent and none being offered, the court finds that respondent has not complied with the order of the court entered on March 3, 1924, directing him to pay to his co-defendant \$25,000.00, and that he fails and refuses to pay the same and stands in default of the order of the court.

Court finds that respondent is guilty of willful contempt of court for refusing to pay the same as theretofore ordered, and orders him committed to jail until he shall pay to his co-defendant that sum of money, as required by the order of March 3, 1924, or until he is otherwise discharged from imprisonment by the process of law. From that order Hruschka also appealed, and that appeal is docketed in this court as No. 23457.

It is thus contended that the order of docketing is erroneous to pay over to his co-defendant the proceeds of the sale of sales orders, and also the later order committing him to jail until he shall comply with the first order, violate the section of the constitution prohibiting imprisonment for debt. It is a sufficient answer to this contention to say that by appealing to this court and assigning errors on other

matters which this court has jurisdiction to determine, appellant has waived the constitutional question involved. (McDonald v. Spring Valley, 235 Ill. 52, 55; Starch Piano Co. v. Stark, 276 Ill. 413, 414; The People v. Vaughan, 262 Ill. 163, 165; Barnes v. Drainage Commissioners, 221 Ill. 627; Case v. City of Sullivan, 222 Ill. 56; P. C. C. & St. L. Ry. Co. v. City of Chicago, 242 Ill. 173.) However, we note that in several of the cases cited by appellant in support of this contention, the Supreme court has held that the constitutional provision mentioned does not apply to cases where the alleged contempt results from wilful obstinacy or fraud, both of which are present in this case. (Dinet v. The People, 73 Ill. 183; O'Callaghan v. O'Callaghan, 69 Ill. 552; Blake v. The People, 80 Ill. 11.)

Appellant's next point is that "the decree for commitment" is erroneous because it does not show that appellant was, at that time, in possession of the proceeds of the sale of toilet water, or is financially able to obey the decree to pay over the money to his co-receiver. In The People v. Zimmer, 233 Ill. 607, it was held that where a receiver has wrongfully converted or expended the money in his hands and is proceeded against for contempt of court for failing to comply with an order to pay over the money, his inability to pay, resulting from his wrongful act, presents no defense to the proceeding and he may be committed for contempt notwithstanding such inability. In that case it was further held that where such a receiver relies upon his inability to pay, he must show that fact by setting forth in his answer "a detailed statement of his affairs," and if he claims to be insolvent, his answer should be accompanied by such a showing as would prima facie show that such is the fact. In effect, the decision holds that in such a case the burden of showing his alleged inability

to pay is upon the respondent.

It is next urged that the respondent's sworn answer purged him of contempt. This contention is based upon the theory that the proceedings are constructive criminal contempts. Such is not the fact. They are purely civil contempts. In The People v. Panchire, 311 Ill. 622, it was held that contempt proceedings in chancery cases are "in the nature of criminal proceedings, but they are not crimes within the meaning of the statute defining misdemeanors, or the constitution requiring that the accused shall have the right of trial by jury." This was followed by State v. Froelich, 316 Ill. 77, 85, holding that a respondent in such cases cannot "merely by his sworn answer, purge himself of the contempt and be discharged." To the same effect is State v. Aiello, 317 Ill. 159, 163. Moreover, the answers of the respondent to the petition are not, in any proper sense, denials of the material allegations of the petitions, but except as to such averments as he refused to answer, they are, in effect, admissions. The affidavit to the answer to the first petition verifies nothing, as is apparent from the language thereof.

It is also claimed that the orders sought to be reviewed do not contain sufficient findings of fact to enable this court to review the record and for that reason the orders must be reversed. The record is as we have stated and the orders contain specific findings of the facts necessary to sustain them. If there could be any question as to our right to consider both petitions and orders together, that doubt must be resolved against appellant, who consented that the cases be consolidated for hearing in this court, and who has brought up to this court praecepta records only. The records so filed show, we think, that the respondent was afforded every reasonable opportunity to be heard and to present

evidence in his own behalf. We find no basis in the record for his contentions that his rights were in any manner infringed.

As to the claim that the orders require him to account for the proceeds of illegal transactions, the record does not show, and we cannot assume, that such was the fact except in so far as they constituted a fraud upon the court.

We have fully considered the other contentions made, and think they are without merit.

The order is affirmed.

AFFIRMED.

Gridley, F. J., and Barnes, J., concur.

...in his own country. We find no trace in the records of
his continental tour that his rights were in any manner infringed.
As to the claim that the emperor treated him as a prisoner
for the purpose of illegal transactions, the emperor had no
share, and no personal interest, that with the fact that he was
for as they established a bond with the emperor.

We have fully examined the emperor's continental tour,
and find that the emperor's rights were not infringed.
The emperor is at liberty.
...
...

Officially, the emperor is at liberty, and his rights are not infringed.
...

...

...

...

...

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31649

THE PEOPLE OF THE STATE OF
ILLINOIS ex rel. LOUIS L.
EMMERSON, Secretary of State
of Illinois,

Appellee,

v.

WILKS E. SMITH et al.,
Appellants.

INTERLOCUTORY

APPEAL FROM SUPERIOR
COURT, COCK COUNTY.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This appeal is from an interlocutory order enjoining defendants, until the further order of the court, from selling or offering to sell in Illinois any securities not specifically exempted by section 5 of the Illinois Securities Law.

The order was entered on motion of complainant, supported by the verified bill, after notice to defendants. Upon the hearing of that motion, defendants presented an affidavit made by one of the defendants to the effect that the defendants' attorney is a member of the Legislature and in actual attendance on the sessions thereof, "and that his attendance as attorney for the defendants in the above entitled cause is necessary to a fair and proper trial of the same;" and thereupon moved to continue the cause until after the adjournment of the present General Assembly. The court denied the motion for a continuance and granted the preliminary injunction. Defendants appeal, and in their briefs claim that the court was without jurisdiction to enter the order after the affidavit for continuance was presented. No other alleged error is discussed in appellant's brief.

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TO THE DIRECTOR, FBI
FROM THE DIRECTOR, FBI
SUBJECT: [REDACTED]
[REDACTED]

8. *Journal of Management Studies*, 1997, 34, 1, 1-14.

4

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1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 26

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

This agency is known as the Federal Bureau of Investigation (FBI). It is the largest and most powerful of the federal law enforcement agencies. It is responsible for the investigation and prosecution of federal crimes, and for the maintenance of law and order throughout the United States.

When the hearing of these motions, defendant's proposed an alternative made by one of the defendants to the effect that the defendant's attorney is a member of the Legislature and in actual residence on the western coast, and that his residence is necessary for the defendant in the above entitled case is necessary in a civil and proper field of the court.

and thereupon moved to continue the same until after the adjournment of the present term. The court denied the motion for a continuance and granted the preliminary in- junction. Defendants appeal, and in their brief claim that the court was without jurisdiction to order the writ after the writs for continuance was granted. No other alleged error is claimed in appellant's brief.

The affidavit for continuance is practically identical, both in form and substance, with that considered by the Supreme court in the recent case of Johnson v. Theoderon, 334 Ill. 543, which held the affidavit to be insufficient because no facts are alleged showing that "the presence of defendants' solicitor is necessary to a fair and proper trial" of the cause.

For the reasons stated in that opinion, the order is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

245 I.A. 614^{#1}

306 - 31438

SHERMAN STATE BANK,
a corporation,

v.

CROFTS & REED CO.,
a corporation, et al.

M. R. KOMLOWSKI,
Petitioner,
Appellee,

v.

E. W. HAREMSKI,
Respondent,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

PER CURIAM.

This appeal is from so much of an order of the Circuit court entered in a receivership proceeding as finds and adjudges the appellant, E. W. Haremski, one of the two receivers, guilty of contempt of court for appropriating to his own use the sum of \$29,622.07 and refusing to account for the same. The record in this proceeding was by agreement consolidated with the record in No. 31437, and both cases were heard together.

For the reasons stated in the opinion filed this day in No. 31437, the order in this case is affirmed.

AFFIRMED.

24514.014

200 - 1122

RECEIVED
JAN 10 1964
U.S. DEPT. OF JUSTICE

RECEIVED
JAN 10 1964
U.S. DEPT. OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C.

RECEIVED

This report is from a copy of the original
report received in a telephonic interview on January 8, 1964, and
the applicant, J. V. [redacted], one of the two respondents, advised
at contact of copy for representation to his own and the name of
the [redacted] and relating to account for the same. The record in
this proceeding was by agreement consolidated with the record in
No. 1122, and both cases were heard together.
For the reasons stated in the opinion filed this
day in No. 1122, the order in this case is affirmed.
[redacted]

245 I.A. 614^{#2}

312 - 31444

MORRIS Z. HOLLAND,
Appellee,

v.

ROYAL INDEMNITY CO.,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

PER CURIAM.

This appeal is from a judgment of \$5,235.40 entered upon a verdict of the jury in a suit brought upon an insurance policy issued by defendant indemnifying plaintiff against loss sustained by robbery.

The grounds urged for reversal are that plaintiff did not comply with certain provisions of the policy relating to custodians of the premises, and to keeping books or accounts, and that the court refused to give certain instructions to the jury.

The policy is issued in consideration of the premium and of the statements contained in a "schedule" endorsed thereon. Plaintiff occupied a one-story building at 6351-53 South Halsted street, Chicago, called and referred to in the policy as "the premises." The policy covers "interior robbery insurance to money, securities and merchandise, between the hours of 7 a. m. and 12 midnight, while contained within the premises."

On February 12, 1926, Phillip Guberman, employed by plaintiff as manager and salesman, arrived at the premises referred to about 8:40 in the morning. He found awaiting him in a vestibule at the entrance of the store two other employees of the plaintiff, Harold Bugg, also a salesman, and Milton Clark, who acted as a messenger and a porter. Guberman unlocked the door and he and Clark entered, Clark going immediately to the

IN - 1914

ATTEST FROM CHIEF CLERK

RECEIVED

RECEIVED

THE CHIEF

This report is from a judgment of \$2,000.00 entered upon a verdict of the jury in a suit brought upon an insurance policy issued by defendant indemnifying plaintiff against loss sustained by robbery.

The grounds urged for reversal are that plaintiff did not comply with certain provisions of the policy relating to examination of the premises, and to keeping books or accounts, and that the court refused to give certain instructions to the jury.

The policy is issued in consideration of the premium and of the statements contained in a "schedule" endorsed thereon. Plaintiff executed a non-est receipt of \$250.00 from the insurer, Chicago, Illinois and returned to him the policy as "the premium". The policy covers "robbery losses sustained by money, securities and negotiables, between the hours of 7 a. m. and 12 midnight, while contained within the premises."

On February 12, 1914, William Guberman, employed by plaintiff as manager and salesman, arrived at the premises referred to about 8:40 in the morning. He found awaiting him in a vestibule at the entrance of the store two other employees of the plaintiff, Harold Dunn, also a salesman, and William Clark, who acted as a messenger and a porter. Guberman unlocked the door and he and Clark entered, Clark going immediately to the

basement to attend to the furnace. Bugg remained in the vestibule to talk with a passerby. While so standing in the vestibule three persons (the robbers) passed through said vestibule or entrance into the store. Shortly afterwards Bugg entered the store and was immediately confronted by one of the three robbers who placed a gun to his side or back and forced him into a rear room. At the same time the other two robbers with guns were forcing Guberman to the safe. He was forced to take therefrom the jewelry taken by the robbers and constituting the loss complained of. Clark did not return from the basement until after the robbery.

It is urged that Clark was not a custodian in the sense in which that term is used in the policy, and that Bugg was not "on duty within the premises" when the insurance applied, that therefore, there was only one custodian within the premises at the time of the robbery, and hence plaintiff did not take the precaution to prevent loss required of the insured by the terms of the policy.

The provision of the policy with regard to custodians reads as follows:

"The foregoing agreement is subject to the following conditions: * * * 1 (a) 'custodian' means the Insured or a person in the Insured's employ at least seventeen and not over sixty-five years of age, who acts as the Insured's paymaster, messenger, cashier, salesman, clerk or collector, and who, while so acting has the insured property in his actual care and custody."

One of the statements made by the insured in the "schedule" (which we think is in the nature of a promissory warranty) is that there will be three or more custodians "who always will be on duty within the premises when the insurance applies."

The undisputed facts bearing upon the contention that there was not a compliance with these provisions are as follows:

It appears that the messenger service performed by

insurance to extend to the insured. When retained in the vehicle
to take with a passenger. While so operating in the vehicle there
persons (the insured) passed through said vehicle or entrance into
the store. Shortly afterwards they entered the store and was
immediately contacted by one of the three robbers who placed a
gun to his side of head and forced him into a rear room. At the
same time the other two robbers also went into the rear room in
the store. He was forced to take the other two robbers into the
the robbery and participating in the same. After the
and returns from the basement until after the robbery.
It is argued that Glass was not a participant in the robbery
in which case he was in the policy, and that he was not
"on duty" while the robbery was in progress. It is argued that
therefore, Glass was not on duty while the robbery was in progress.
time of the robbery, and hence plaintiff did not take the insurance
to prevent loss recovery of the insured by the terms of the policy.
The provision of the policy with regard to conditions

reads as follows:

"The foregoing agreement is subject to the following
conditions: (a) 'insured' means the insured or
a person in the insured's employ at time of accident and not
over thirty days prior to the date of the insured's
employment, ownership, control, lease or collection,
and who, while so acting has the insured property in his
actual care and custody."

One of the statements made by the insured in the
"affidavit" (which we think is in the nature of a promissory
warranty) is that there will be three or more decisions "who
there will be an entry within the premises when the insurance
company."

The undersigned facts bearing upon the condition that
there was not a compliance with these provisions are as follows:
It appears that the messenger service performed by

Clark consisted of delivering merchandise to customers and to plaintiff's other store about a block away. At other times most of his duties consisted of work ordinarily performed by a janitor. He had charge of the furnace, washed the windows, and cleaned and swept the store. In his absence one of the salesmen might put coal in the furnace. He was sometimes permitted to sell a radio battery. He was not permitted to take the telephone. On this state of facts the question was presented whether he was a custodian within the meaning of the policy, appellant contending that he could be regarded as such only while performing his duties as messenger and while having the "insured property in his actual care and custody," and that was when he was outside the store on messenger service, therefore he could not be regarded as a custodian of property "inside of the premises," to which the policy was restricted in application.

Inasmuch as his messenger service would begin while he was in the store we apprehend that while there he would come within the definition of a custodian. We construe paragraph 1 (e), above quoted, to include as custodian anyone within the premises at the time of the robbery who may be called upon while there to act in any of the capacities enumerated in said paragraph, and that it is immaterial that he may be also called upon to perform other services not strictly within the duties of his position, if present to perform the services required of him therein. The main purpose of the provision is accomplished if the requisite number of persons so designated as custodians are within the premises at the time of a robbery where in their line of duty they may exercise care and custody of the property entrusted to them.

While the salesman Bugg was a custodian within the

Their consisted of relieving movements to customers and to
 similarly's other state about a black army. At other times more
 of his duties consisted of work ordinarily performed by a janitor.
 He had charge of the furnace, which the witness was ordered and
 kept the stove. In his opinion one of the witnesses might not
 call in the furnace. He was sometimes permitted to tell a radio
 battery. He was not permitted to take the telephone. On this
 state of facts the question was presented whether he was a
 custodian within the meaning of the policy, especially considering
 that he could be regarded as such only while performing his duties
 as messenger and while having the "insured property" in his custody
 and not custody, "and that was when he was outside the store or
 out-door service, therefore he could not be regarded as a
 custodian of property "inside of the premises", in which the
 policy was restricted in application.
 Inasmuch as his messenger service would begin while
 he was in the store we apprehend that while there he would come
 within the definition of a custodian. We construe paragraph
 1 (c), above quoted, to include an exception except within the
 premises at the time of the robbery who may be called upon while
 there to act in any of the capacities enumerated in said para-
 graph, and that it is immaterial that he may be also called upon
 to perform other services not strictly within the duties of his
 position, if present to perform the services required of him
 therein. The main purpose of the provision is accomplished if
 the requisite number of persons so designated as custodians are
 within the premises at the time of a robbery where in their line
 of duty they may conceivably care and custody of the property
 entrusted to them.
 While the witness Jany was a custodian within the

meaning of provision 1 (e), above quoted, appellant argues that he was not "within the premises on duty" at the time of the robbery and therefore there were at most only two custodians within the premises at the time the insurance applied. The entrance to the store was through a V-shaped vestibule, the door to the store opening from the narrow part of the V. On the sides of the V were enclosed glass show windows. We infer from the evidence that the roof or portion of the building extended over the entrance. It is the opinion of a majority of the court that as Hugg was within said entrance, with the door unlocked, he had entered upon his work for the day and therefore there was a substantial compliance with the provision in question.

It is further contended that there was a non-compliance by the insured with the provision relating to the keeping of books or the accounts. With respect to them the policy provides:

"This policy does not cover: * * *
(f) Loss, unless books or accounts are regularly kept by the insured, and the loss can be accurately determined therefrom by the Company."

Such a provision is undoubtedly intended to protect the defendant against an excessive and fraudulent claim. (Leiman v. Metropolitan Surety Co., 111 N. Y. Sup. 536; Israelstam v. U.S. Casualty Co., 301 Ill. App. 512; Tucker v. American Bonding & Casualty Co., 223 Ill. App. 266.) It is not questioned that the parties were competent to and had a legal right to insert such provision in the agreement, and that it is the duty of the court to construe and enforce it as made and not to make a new contract for the parties. (Blume v. Pittsburgh Life & Trust Co., 263 Ill. 160, 164; Hebner v. Salatine Insurance Co., 157 Ill. 144; Grand Pacific Hotel Co. v. Michigan Commercial Insurance Co., 143 Ill. App. 143, 149.) The language is not ambiguous so as to call for construction against the insurer, and it should not be perverted for the purpose of creating ambiguity. Crosse v. Knights

of Honor, 254 Ill. 80, 86; Kancock v. Knights of Security, 303 Ill. 66, 73.)

The question is whether the evidence sustains the plea of non-compliance with this provision.

The undisputed facts are as follows: Plaintiff kept a stock book in which was given a general description of the pieces of jewelry he had made up for sale, and also the selling price. There was nothing therein, or in any other book or papers showing business transactions, except the envelopes hereinafter referred to, (which we infer were destroyed) to indicate their cost or value or from which it could be determined. Plaintiff bought his diamonds and his mountings separately, in quantities, but he could not identify from the invoices or bills therefor any particular article of jewelry, or the parts thereof, after it was mounted. Plaintiff knew the cost of each diamond and mounting when he sent them out to his other store for setting. At that time he noted on the envelope containing them the cost of each, and when the envelope was returned with the article it also had noted thereon the cost of setting. The bookkeeper then entered in the sales book as the selling price twice the summary of these items of cost. This system was testified to by plaintiff and his bookkeeper. He estimated his loss at the cost price as thus determined, i. e., half of the selling price as shown on the book, or in some instances a little less where the style of the article rendered it less salable than when made up. He testified that these were the market values.

It is urged that inasmuch as the amount of plaintiff's loss could not be definitely ascertained from the books themselves and required oral testimony as above stated, the books were not kept in conformity with the provision of the policy.

Of course, plaintiff's loss was the market value

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The question is whether the volume contains the

list of non-employees with this provision.

The following facts are as follows: The volume was a

book which in 1911 was given a general description of the

of society he had made up for sale, and also the selling price.

There was nothing therein, or in any other book of papers showing

business transactions, except the volume mentioned in the

it, (which is not a copy of the volume) is limited to the year 1911

volume of 1911 which is not a copy of the volume. It is not a

list of names and the names of persons, in addition, but the

could not identify from the volume or other sources any

particular article of property, or the name thereof, after it

was written. Plaintiff knew the name of each diamond and mounting

when he sent them out to the other side for selling. It is

also he noted on the envelope containing them the name of each,

and when the envelope was returned with the article it also had

noted thereon the name of selling. The bookkeeper then entered

in the book of the selling price for each of these

items of cash. This system was verified by Plaintiff and

the bookkeeper. He explained his face as the only place in the

business, 1911, list of the selling price as shown on the book,

as in some instances a list of items where the title of the article

transferred is less valuable than when made up. He testified that

these were the names of the

It is noted that the volume of the names of Plaintiff's

list could not be definitely ascertained from the book mentioned

and repeated and testimony as above stated. The books were not

kept in conformity with the provision of the policy.

Of course, Plaintiff's face was the market value

of the articles stolen. It would hardly be expected that the books would show the precise market value, which might fluctuate. The provision manifestly contemplated that the books should be so kept as to enable the insurer to ascertain the loss, which, of course, would be the market value of the missing goods. Defendant offered no evidence tending to prove or disprove the amount of the loss, but relied on the facts as above stated as sustaining its plea of non-conformity with the terms of the policy as aforesaid, and its consequent inability to ascertain the loss from the books. Whether that could be ascertained from a description of the articles does not appear from the record. No experts were called to testify on either side with regard thereto. Appellant further contends that plaintiff kept no books or accounts or data from which it could verify the verbal testimony as to the cost of the articles lost. It might also be said that had plaintiff placed in his books the exact cost of the article or the several parts thereof it would have been equally impossible to verify the same from the bills, invoices or other data plaintiff was able to furnish. Manifestly much detailed requirements would have been necessary to show the exact cost of articles of such character, purchased, as they were, in quantities and not specifically itemized, or capable of identification from other similar articles in the group from which they were taken to be made up into the described article. The provision did not specifically require plaintiff to enter the cost of the articles on his books or that he keep his books in such a manner as to show the cost. He was to keep them in such a manner that the loss could be accurately determined. Under plaintiff's system of bookkeeping it could be ascertained if the cost was correctly stated on the envelope from which the bookkeeper entered the

selling price. The number and character of the articles lost are not questioned, and the system of keeping the books is not disputed.

In Liverpool Ins. Co. v. Ellington, 94 Ga. 785, where plaintiff covenanted to "keep a set of books showing a complete record of business transactions, including all purchases and sales both for cash and credit," and it appeared that plaintiff did not keep what is usually termed a "cash book," showing daily cash sales or a distinct record showing merchandise sold for cash, it was held that "it was sufficient if the books were kept in such manner that, with the assistance of those who kept them or understood the system on which they were kept, the amount of purchases and sales could be ascertained, and cash transactions distinguished from those on credit, although it might be slow and difficult to do this." This doctrine was held applicable to the state of facts in Olsen v. Great Eastern Casualty Co., 149 Minn. 353, which held that the insurance company could have accurately determined the loss from the system employed of keeping accounts, some of which were missing, had it chosen to attempt the task. Appellant cites German Ins. Co. v. John W. Bates & Co., 67 Ill. App. 370, where to show the loss, plaintiff had to rely on verbal testimony. But it clearly appeared there that the loss could not be ascertained from the books even as explained.

The testimony as to the cost price and the selling price was not objected to, but objection was made to the admissibility of the books because they do not show the cost price, or, in other words, enable defendant to determine the loss. The amount of the loss claimed is not directly disputed, nor plaintiff's claim that the cost prices as arrived at were the market value of the articles as testified to by him. The plea goes to the right to any

calling prices. The number and character of the articles lost
are not questioned, and the system of keeping the books is
not disputed.

On January 1st, 1900, the plaintiff's books were found to contain a number

of entries which were not in the books of the defendant, and it appeared that plaintiff

had not kept a "cash book," showing daily

sales at a distinct record showing merchandise sold for

cash, it was held that "it was not shown that the books were kept

in such manner that, with the assistance of those who kept them

or who received the goods on which they were kept, the amount of

profits and sales could be ascertained, and that the defendant

was not entitled to the books on which it might be able

to find the entries. This decision was held applicable

to the case of John v. John, 100 Cal. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

was not objected to, but objection was made to the conclusively

of the books because they do not show the cost prices, or, in other

words, enable defendant to determine the loss. The amount of the

loss claimed is not directly disputed, nor plaintiff's claim that

recovery on the theory of non-compliance with the provision as to the keeping of books. It was held in Leiman v. Met. Surety Co., 111 N. Y. Supp. 536, where a similar defense was set up, that the insurance company could not be allowed to escape liability under a similar agreement with respect to books intended, as the court held, to protect the defendant against an excessive claim, where the amount is not in dispute. It appeared there that if the invoices had been preserved, which were destroyed after the burglary, there would have been no question that the accounts kept by the insured would have complied with the terms of the policy. The court said the invoices would have supplied the deficiency in the books of account. And here it might be said that had plaintiff preserved the envelopes which purported to give the specific cost of the items going to make up the cost of the described articles, the data appearing thereon from which the bookkeeper estimated the selling price entered in the stock book would have supplied the deficiency in the books of account. The court there said: "The law does not require that the insured should be held to strict compliance, but to such compliance as is fair and reasonable under the circumstances." It might still, of course, be a matter of conjecture whether the actual cost of the item was placed on the envelope. But there is no claim of fraud here, and it is hardly probable that plaintiff would employ a system that would deceive himself. We are not disposed to hold that the proof sustained the plea of non-compliance with the provisions of the policy.

The two instructions refused set forth defendant's theory of the provisions in question not in consonance with

... as the theory of non-compliance with the provision as
to the holding of books. It was held in Smith v. Smith, 111 N.Y. 234, 235, where a similar defense was set up,
that the insurance company could not be allowed to escape liability
under a similar agreement with respect to books intended as the
evidence, to prevent the defendant against an excessive claim,
where the amount is not in dispute. It appeared there that if the
involvement had been preserved, which were destroyed after the
discovery, there would have been no question that the insurance
company could have been held liable for the loss of the
policy. The court said the insurance would have supplied the
evidence in the books of account. And here it might be said
that had plaintiff preserved the books, which were destroyed, he
could have supplied the evidence in the books of account.
The court there said: "The law does not require that the insurance
company should be held to keep accounts, but to keep accounts as to
their and reasonable under the circumstances." It might still be
said, as a matter of conjecture whether the actual loss of the
books was placed on the envelope. The answer is no claim of loss
here, and it is hardly probable that plaintiff would engage a
system that would destroy himself. He was not disposed to hold
that the proof contained the plan of non-compliance with the
provisions of the policy.
The two instructions returned and both statements
theory of the provision in question not in accordance with

our interpretation of them. We think they were properly refused.

The judgment is affirmed.

AFFIRMED.

MR. JUSTICE BARNES DISSENTING:

I do not think the custodian Bugg was either on duty or within the premises within the terms of the promissory warranty that three custodians will always be on duty within the premises when the insurance applies. I also entertain grave doubt as to plaintiff's compliance with the provision relating to the keeping of books or accounts by the insured. Unless the value of the articles could be reasonably determined from their description, there was apparently no way of determining the amount of the loss from the books as kept, provided the oral testimony of the method of arriving at the cost of the made up article without verification from reliable data on the subject was inadmissible.

any investigation of them. It seems they are innocent.

1. *Source: The author's own collection.*

1991-1992 1992-1993 1993-1994 1994-1995 1995-1996 1996-1997 1997-1998 1998-1999 1999-2000 2000-2001 2001-2002 2002-2003 2003-2004 2004-2005 2005-2006 2006-2007 2007-2008 2008-2009 2009-2010 2010-2011 2011-2012 2012-2013 2013-2014 2014-2015 2015-2016 2016-2017 2017-2018 2018-2019 2019-2020 2020-2021 2021-2022 2022-2023 2023-2024 2024-2025 2025-2026 2026-2027 2027-2028 2028-2029 2029-2030 2030-2031 2031-2032 2032-2033 2033-2034 2034-2035 2035-2036 2036-2037 2037-2038 2038-2039 2039-2040 2040-2041 2041-2042 2042-2043 2043-2044 2044-2045 2045-2046 2046-2047 2047-2048 2048-2049 2049-2050 2050-2051 2051-2052 2052-2053 2053-2054 2054-2055 2055-2056 2056-2057 2057-2058 2058-2059 2059-2060 2060-2061 2061-2062 2062-2063 2063-2064 2064-2065 2065-2066 2066-2067 2067-2068 2068-2069 2069-2070 2070-2071 2071-2072 2072-2073 2073-2074 2074-2075 2075-2076 2076-2077 2077-2078 2078-2079 2079-2080 2080-2081 2081-2082 2082-2083 2083-2084 2084-2085 2085-2086 2086-2087 2087-2088 2088-2089 2089-2090 2090-2091 2091-2092 2092-2093 2093-2094 2094-2095 2095-2096 2096-2097 2097-2098 2098-2099 2099-2100 2100-2101 2101-2102 2102-2103 2103-2104 2104-2105 2105-2106 2106-2107 2107-2108 2108-2109 2109-2110 2110-2111 2111-2112 2112-2113 2113-2114 2114-2115 2115-2116 2116-2117 2117-2118 2118-2119 2119-2120 2120-2121 2121-2122 2122-2123 2123-2124 2124-2125 2125-2126 2126-2127 2127-2128 2128-2129 2129-2130 2130-2131 2131-2132 2132-2133 2133-2134 2134-2135 2135-2136 2136-2137 2137-2138 2138-2139 2139-2140 2140-2141 2141-2142 2142-2143 2143-2144 2144-2145 2145-2146 2146-2147 2147-2148 2148-2149 2149-2150 2150-2151 2151-2152 2152-2153 2153-2154 2154-2155 2155-2156 2156-2157 2157-2158 2158-2159 2159-2160 2160-2161 2161-2162 2162-2163 2163-2164 2164-2165 2165-2166 2166-2167 2167-2168 2168-2169 2169-2170 2170-2171 2171-2172 2172-2173 2173-2174 2174-2175 2175-2176 2176-2177 2177-2178 2178-2179 2179-2180 2180-2181 2181-2182 2182-2183 2183-2184 2184-2185 2185-2186 2186-2187 2187-2188 2188-2189 2189-2190 2190-2191 2191-2192 2192-2193 2193-2194 2194-2195 2195-2196 2196-2197 2197-2198 2198-2199 2199-2200 2200-2201 2201-2202 2202-2203 2203-2204 2204-2205 2205-2206 2206-2207 2207-2208 2208-2209 2209-2210 2210-2211 2211-2212 2212-2213 2213-2214 2214-2215 2215-2216 2216-2217 2217-2218 2218-2219 2219-2220 2220-2221 2221-2222 2222-2223 2223-2224 2224-2225 2225-2226 2226-2227 2227-2228 2228-2229 2229-2230 2230-2231 2231-2232 2232-2233 2233-2234 2234-2235 2235-2236 2236-2237 2237-2238 2238-2239 2239-2240 2240-2241 2241-2242 2242-2243 2243-2244 2244-2245 2245-2246 2246-2247 2247-2248 2248-2249 2249-2250 2250-2251 2251-2252 2252-2253 2253-2254 2254-2255 2255-2256 2256-2257 2257-2258 2258-2259 2259-2260 2260-2261 2261-2262 2262-2263 2263-2264 2264-2265 2265-2266 2266-2267 2267-2268 2268-2269 2269-2270 2270-2271 2271-2272 2272-2273 2273-2274 2274-2275 2275-2276 2276-2277 2277-2278 2278-2279 2279-2280 2280-2281 2281-2282 2282-2283 2283-2284 2284-2285 2285-2286 2286-2287 2287-2288 2288-2289 2289-2290 2290-2291 2291-2292 2292-2293 2293-2294 2294-2295 2295-2296 2296-2297 2297-2298 2298-2299 2299-2300 2300-2301 2301-2302 2302-2303 2303-2304 2304-2305 2305-2306 2306-2307 2307-2308 2308-2309 2309-2310 2310-2311 2311-2312 2312-2313 2313-2314 2314-2315 2315-2316 2316-2317 2317-2318 2318-2319 2319-2320 2320-2321 2321-2322 2322-2323 2323-2324 2324-2325 2325-2326 2326-2327 2327-2328 2328-2329 2329-2330 2330-2331 2331-2332 2332-2333 2333-2334 2334-2335 2335-2336 2336-2337 2337-2338 2338-2339 2339-2340 2340-2341 2341-2342 2342-2343 2343-2344 2344-2345 2345-2346 2346-2347 2347-2348 2348-2349 2349-2350 2350-2351 2351-2352 2352-2353 2353-2354 2354-2355 2355-2356 2356-2357 2357-2358 2358-2359 2359-2360 2360-2361 2361-2362 2362-2363 2363-2364 2364-2365 2365-2366 2366-2367 2367-2368 2368-2369 2369-2370 2370-2371 2371-2372 2372-2373 2373-2374 2374-2375 2375-2376 2376-2377 2377-2378 2378-2379 2379-2380 2380-2381 2381-2382 2382-2383 2383-2384 2384-2385 2385-2386 2386-2387 2387-2388 2388-2389 2389-2390 2390-2391 2391-2392 2392-2393 2393-2394 2394-2395 2395-2396 2396-2397 2397-2398 2398-2399 2399-2400 2400

[illegible]

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332 - 31464

JOSEPH LIPSON, HARRY LIPSON
and NATHAN LIPSON, copartners
as Lipson Bros.,
Appellees.

v.

ERIE RAILROAD COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE GRIBLEY DELIVERED THE OPINION OF THE COURT.

On May 26, 1924, a fourth class action in contract was commenced against the Erie Railroad Company (hereinafter referred to as the Railroad Co.) and the Joseph Stockton Transfer Co., (hereinafter referred to as the Transfer Co.) as defendants. In June, 1926, a trial was had before a jury. At the conclusion of all the evidence the court directed the jury to return a verdict finding the issues in favor of the Transfer Co., and, upon such verdict being returned, judgment for costs was entered in its favor against plaintiff. As to the issues as to the remaining defendant, the Railroad Co., after oral instructions by the court, the jury returned a verdict against it and assessed plaintiff's damages at \$630. Judgment in that amount against the Railroad Co. followed, which judgment by this appeal it seeks to reverse. The question, whether the directed verdict and judgment in favor of the Transfer Co. were proper, is not before us on this record.

In plaintiffs' amended statement of claim, after charging that both defendants are common carriers, it is averred in substance that, on April 25, 1922, at Passaic, New Jersey, plaintiffs caused to be delivered to the Railroad Co. 674-5/8 yards of worsted dress goods of the value of \$1620.83, to be

safely carried by the Railroad Co. to Chicago, Illinois, and from its Chicago station by the Transfer Co. to plaintiffs' place of business in Chicago, and there to be safely delivered to plaintiffs; that in consideration of certain rewards paid by plaintiffs to each of the defendants, each promised and agreed to safely carry and deliver the goods; that, disregarding these promises, they did not do so, but so carelessly and negligently behaved themselves that, through their negligence, about 350 yards of said goods were wholly lost, and thereby plaintiffs were damaged to the amount of \$631.02.

In the affidavit of merits of the Railroad Co. it is admitted that, on the day mentioned, the plaintiff did deliver to it at Passaic "certain goods," to be safely carried by it to Chicago, but it is denied that the goods so delivered to it consisted of 674-5/8 yards, or of the total value of \$1820.83, or that the Railroad Co. agreed to safely carry and deliver any goods to plaintiffs' said place of business, or that any of the goods were lost while in its possession. And it is alleged that upon request it delivered to the Transfer Co. at Chicago, after the arrival there of the shipment, the same goods, and of the same amount and value, as were received by it at Passaic.

As the amount and value of the goods consigned to plaintiffs and delivered to the Railroad Co. at Passaic for carriage and delivery to them at Chicago, and as to the amount and value of the goods received by them from the Transfer Co. at their said place of business in Chicago, the evidence on the trial was conflicting. From the evidence adduced, and considering the pleadings, we think that it was for the jury to say, as matters of fact, whether, when the Railroad Co. received the box or case containing certain worsted dress goods at Passaic

being carried by the Railroad Co. to Chicago, Illinois, and
 from the Chicago station by the Transfer Co. to Philadelphia.
 Place of business in Chicago, and there to be safely delivered
 to Philadelphia in the hands of the Transfer Co. and
 by Philadelphia to each of the defendants, with prompt and agreed
 to safely carry and deliver the goods to the defendants, and
 to receive therefor the sum of \$100,000, and to deliver the same
 to the defendants in the hands of the Transfer Co. and to receive
 therefor the sum of \$100,000, and to deliver the same to the
 defendants in the hands of the Transfer Co. and to receive therefor
 the sum of \$100,000, and to deliver the same to the defendants
 in the hands of the Transfer Co. and to receive therefor the sum
 of \$100,000, and to deliver the same to the defendants in the
 hands of the Transfer Co. and to receive therefor the sum of
 \$100,000, and to deliver the same to the defendants in the hands
 of the Transfer Co. and to receive therefor the sum of \$100,000.

In the absence of notice of the Railroad Co. it is
 admitted that, on the day mentioned, the defendant has delivered
 to it at least "certain goods," as he safely carried by it to
 Chicago, but it is stated that the goods so delivered to it
 consisted of 500-500 yards, or of the total value of \$100,000,
 or that the Railroad Co. agreed to safely carry and deliver any
 goods to Philadelphia, and also at Chicago, or that any of the
 goods were lost while in the possession, and it is alleged that
 upon receipt of delivery at the Transfer Co. at Chicago, after
 the arrival there of the shipment, the said goods, and of the
 same amount and value, as were received by it at Chicago.

As the amount and value of the goods consigned to
 Philadelphia and delivered to the Railroad Co. at Chicago for
 carriage and delivery to them at Chicago, and as to the amount
 and value of the goods received by them from the Transfer Co.
 at their place of business in Chicago, the witness on the
 first was questioning. From the witness's answer, and statement
 for the plaintiff, we learn that it is the fact as set
 out above of fact, whether, when the Railroad Co. received the
 goods or was carrying certain named goods at Chicago

for carriage and delivery to plaintiffs at Chicago, said box or case contained 674-5/8 yards of said goods, and whether, upon receipt of said box or case from the Transfer Co. by plaintiffs at their place of business in Chicago and upon an examination of the contents, there was found to be a less number of yards of said goods in said box or case than as originally placed therein at Passaic. And in this connection it was essential that the jury should be properly and accurately instructed. Yet the court in the oral charge to the jury stated that the Railroad Co. "admits it received the goods (viz, 674-5/8 yards) from plaintiffs' agent, but denies that it is guilty of any negligence whatever, as charged by plaintiffs, and says," etc. Neither in its affidavit of merits, nor expressly or impliedly on the trial, did the Railroad Co. admit that the box or case which it received at Passaic for carriage to Chicago contained 674-5/8 yards of said goods, or any specific number of yards. In the bill of lading (introduced by plaintiffs) the Railroad Co. acknowledged receipt at Passaic of "1 Case Dry Goods, Worsted Dress Goods" from Garfield Worsted Mills, consigned to Lipson Bros., Chicago, "in apparent good order * * (contents and condition of contents of package unknown)," etc. On the trial the position taken by the Railroad Co., which the evidence introduced by it tended strongly to substantiate, was, that whatever yardage or amount of said goods was contained in said box or case, when the same was received by it at Passaic, was also contained therein when the box or case was delivered at Chicago to the Transfer Co., which, as shown by the evidence, was plaintiffs' agent in hauling the box or case to plaintiffs' place of business in Chicago. Under all the evidence we think that said statement in the court's charge was misleading to

the jury and prejudicial to the Railroad Co., and that the error was not cured by any other portions of the charge, and that there should be a new trial of the cause.

Other claimed errors of the trial court are urged by counsel for the Railroad Co. as grounds for a reversal of the judgment, but these errors, if such they were, are not liable to arise on another trial and it is unnecessary for us to discuss them.

For the reasons mentioned the judgment for \$630 against the Railroad Co. is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Fitch and Barnes, JJ., concur.

The fact was pointed out to the Council, and that the
fact was not covered by any other provision of the Charter, and
that there should be a new trial of the matter.

That claimant status of the trial court was argued by
counsel for the defendant, and grounds for a new trial of the
trial, but that court, it was held, was not bound
to allow an abstract trial and it is unnecessary for us to

decide there.

For the reasons mentioned the judgment of the court
appeals to the Council, and the case is remanded.

For a new trial.

Reversed and remanded.

THE COURT OF APPEALS, in the case of the People vs. [Name],
appeals to the Council, and the case is remanded.

For a new trial.

Reversed and remanded.

THE COURT OF APPEALS, in the case of the People vs. [Name],
appeals to the Council, and the case is remanded.

For a new trial.

Reversed and remanded.

THE COURT OF APPEALS, in the case of the People vs. [Name],
appeals to the Council, and the case is remanded.

For a new trial.

Reversed and remanded.

THE COURT OF APPEALS, in the case of the People vs. [Name],
appeals to the Council, and the case is remanded.

For a new trial.

Reversed and remanded.

THE COURT OF APPEALS, in the case of the People vs. [Name],
appeals to the Council, and the case is remanded.

For a new trial.

Reversed and remanded.

5767a

334 - 31466

GREGORY T. VAN METER,
administrator of the
estate of Stanley Opat,
deceased,

Appellee,

v.

CITY OF CHICAGO,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against defendant for \$5,000, rendered after verdict on May 29, 1926, in an action for damages for negligently causing the death of Stanley Opat, a boy of about 11 years of age. The accident happened about 9:30 o'clock p. m., after dark, on April 25, 1922. The boy died on the following day from the injuries received. The action was commenced on April 13, 1923, under the Injuries Act for the benefit of his next of kin.

The judgment was entered after a third trial of the cause before a jury. On the first trial, had in November, 1924, the jury returned a verdict finding the defendant, City of Chicago, not guilty, and judgment for costs in its favor was entered. On appeal to this appellate court the judgment was reversed, on October 6, 1925, because of errors in the giving of two instructions offered by the City, and the cause was remanded for a new trial. (Van Meter v. City of Chicago, 239 Ill. App. 645, opinion not published.) On the second trial, had in February, 1926, the jury were unable to agree upon a verdict and were discharged. The evidence introduced on the third trial was practically the same as on the first, and in

2451 A. 614

124 - 21440

STATE OF NEW YORK
JUDICIAL DEPARTMENT
IN SENATE

REPORT OF THE
COMMISSIONER OF THE
DEPARTMENT OF SOCIAL WELFARE
IN RESPONSE TO
RESOLUTION NO. 100
PASSED BY THE SENATE
MAY 1, 1934

MR. SPEAKER: I have the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the report of the Commissioner of the Department of Social Welfare in response to Resolution No. 100, passed by the Senate May 1, 1934. This is an appeal from a judgment against defendant for damages for negligently causing the death of Stanley Quesel, a boy of about 12 years of age. The accident happened about 9:30 o'clock p. m., after dark, on April 18, 1933. The boy died on the following day from the injuries received. The action was commenced on April 12, 1933, and the judgment was for the benefit of his next of kin.

The judgment was entered after a third trial of the cause before a jury. On the first trial, held in November, 1932, the jury returned a verdict finding the defendant, City of Chicago, not guilty, and judgment for costs in its favor was entered. On appeal to this appellate court the judgment was reversed, on October 6, 1933, because of errors in the giving of two instructions offered by the City, and the cause was remanded for a new trial. (See City of Chicago v. Quesel, 239 Ill. App. 622, opinion not published.) On the second trial, held in February, 1934, the jury were unable to agree upon a verdict and were discharged. The evidence introduced on the third trial was practically the same as on the first, and in

neither was there any substantial dispute as to the material facts. The statement thereof as contained in our former opinion is sufficiently applicable to the evidence introduced on the third trial to be here quoted, as follows:

"The City was in possession and control of certain wires, used for the transmission of a high-powered electrical current of between 3500 and 4000 volts, and strung upon steel poles along Wentworth Avenue. One of these poles was near the corner of 46th Street and in Wentworth Avenue, close to the sidewalk. It was about 20 feet high, and, commencing about 8 feet above the sidewalk, had a series of alternate steps about 18 inches apart, convenient for climbing. Near its top, and supported by a bracket, there was an electric lamp, used for lighting the streets at night, which was connected by other wires with the high-powered wires mentioned. Over the lamp there was a reflector made of metal, and uninsulated. It would be dangerous to the life of one climbing the pole if any part of his body came in contact with the reflector, of which fact the City through its agents had knowledge. The district was a thickly populated, residential one, and children frequently played on the sidewalks near the pole in the evening as well as the daytime. About 57 inches above the sidewalk there was a hole in the pole, 3-1/2 inches wide and 6 inches long, by means of which and a cable and other mechanism the lamp could be raised or lowered by an operator standing on the sidewalk. The mechanism had not been in use for some considerable time before the accident, yet the hole remained and furnished easy access to the lowest of the steps to one desiring to climb the pole. Young boys during their play often threw their hats upon some of the steps and then climbed up the pole after them. Police officers had warned boys that it was dangerous to climb the pole, and both of the deceased's parents who lived in the vicinity had warned the deceased not to climb the pole. On the evening in question the deceased, playing with other boys on the sidewalk near the pole, climbed it, using said hole and alternate steps, and in some manner, while the lamp was burning, came in contact with the reflector, and 'there was a blue flame' and he fell to the sidewalk, receiving burns and injuries causing his death."

Plaintiff's declaration, to which the City filed a plea of the general issue, consisted of eight counts. Four of them were predicated upon the theory that the pole presented an attraction and allurement to children playing in its vicinity to climb it, and that it was dangerous to one doing so, of which facts the City through its agents had knowledge.

One of the contentions, relied upon by counsel for the

City for a reversal of the present judgment is, that the evidence does not show such negligence on the City's part as warranted the submission of the cause to the jury, and it is argued (a) that "the doctrine of attractive nuisance cannot be applied to public streets," and (b) that "deceased was a trespasser on the pole and the City owed him no duty except not to wantonly injure him." We do not think that there is any merit in the contention or argument. In our former opinion, in holding an instruction given on the first trial to be erroneous and in discussing the degree of care required by the City under the facts and circumstances in evidence, we referred to certain authorities as follows:

In Commonwealth Electric Co. v. Melville, 210 Ill. 70, 78, it is said: "Electricity is a subtle and powerful agent. * * As there is greater danger and hazard in the use of electricity, there must be a corresponding exercise of skill and attention for the purpose of avoiding injury to another, to constitute what the law terms 'ordinary care.' The care must be commensurate with the danger." In Stedwell v. City of Chicago, 397 Ill. 486, 489, it is said: "The City of Chicago was therefore bound to know the dangers incident to lighting its streets with electricity and to guard against accidents by the exercise of a degree of care commensurate with the danger." In an exhaustive annotation, under the heading 'Duty to guard against danger to children by electric wires,' 17 A. L. R., p. 833, the Annotator says: "In view of the deadly character of high-tension wires, * * the courts generally have required a very high degree of care in the placing and maintenance of such wires, in favor of the general public. And in view of the curiosity of children, their ignorance, and heedlessness of danger, and known love of adventure, the courts have imposed an added duty upon persons maintaining deadly wires to guard them so that they will not cause injury to children."

On April 23, 1926, shortly before the rendition of the present judgment, our Supreme Court filed an opinion in the case of Beming v. City of Chicago, 321 Ill. 341. It therein appears that a boy, named Morris, met his death on June 9, 1922, by reason of an electric shock; that in the action brought to recover damages by Beming, the administrator of his estate, a judgment was rendered against the City for \$10,000, which had been

affirmed by another division of this appellate court; and that a writ of certiorari had been granted to review the judgment. It further appears that Morris was about ten years of age, living with his parents and younger brothers on North Claremont avenue, Chicago; that near his home was a poplar tree, growing in a grass plot in the public street, where it had been for a number of years; that the tree was about thirty feet high, its lowest limb being six or seven feet above the ground; that about twenty feet above the ground and about one foot from the trunk of the tree two wires, about twelve inches apart, ran through the branches; that these wires, used by the City to carry electricity for lighting the streets, were insulated, though more for protection of the wires from corrosion than for full insulation, and carried 3150 volts of electricity; that there were spaces on the wires where the insulating covering had been worn away, and for a long time sparks had been noticed in the tree on occasions, particularly after a rain; that about eight o'clock p. m., shortly prior to the accident, Morris was playing with other boys on the grass plot and a kite of one of the other boys became caught in the branches of the tree, with its tail wrapped around the wires; and that Morris climbed the tree to get the kite and while in the tree for that purpose he came in contact with one of the wires and was instantly killed. In reaching the conclusion that there were no errors of law contained in the record, and affirming the judgment, our Supreme Court said (p. 343):

"This injury occurred in a tree in a public street and the deceased was, therefore, not a trespasser at the time he was killed. (Stedwell v. City of Chicago, 297 Ill. 486.) Plaintiff in error was bound, in placing in the street wires which carried a heavy load of electricity, to guard against accidents by the exercise of that degree of care commensurate with the danger incident to the use of such a dangerous agency. (Hausler

Witness of another division of this opinion court; and that a
... had been granted to review the judgment. To
... that Harris was about ten years of age, living
with his parents and younger brothers on North ... street,
Chicago; that near his home was a public tree, growing in a grass
plot in the public street. There it had been for a number of years;
that the three was about thirty feet high, the lowest limb being
six or seven feet above the ground; that about twenty feet above
the ground and about one foot from the trunk of the tree two wires,
about twelve inches apart, ran through the branches; that these
wires, used by the city to carry electricity for lighting the
streets, were insulated, though some law protection of the wires
from corrosion when the full insulation was not used with
of electricity; that there were spacers on the wires where the in-
sulating covering had been worn away, and for a long time
had been noticed in the tree on occasions, particularly after a
rain; that about eight o'clock p. m., shortly before the accident,
Harris was playing with other boys on the grass plot and a sign of
one of the wires, who became caught in the branches of the tree,
with its full weight against the street and that Harris climbed the
tree to get the wire and while in the tree for that purpose he
came in contact with one of the wires and was instantly killed.
In reaching the conclusion that there were no signs of law
violated in the record, and affirming the judgment, our opinion
being said (p. 443):

"This injury occurred in a tree in a public street
and the deceased was, therefore, not a trespasser as the
city was killed. (Harris v. City of Chicago, 207
Ill. 480.) Plaintiff in error was wrong in claiming
in the street wires which carried a heavy load of
electricity, he found against accident by the exercise
of due degree of care commensurate with the danger
incident to the use of such a dangerous agency. (Harris v. City of Chicago, 207 Ill. 480.)"

v. Commonwealth Electric Co., 240 Ill. 201, 204.) Whether the tree located in the public street was so attractive to children in their sports as to suggest the probability of such an accident as occurred, and whether the City was negligent in maintaining the wires as it did, were questions for the jury. (Stadwell v. City of Chicago, supra.) There was sufficient evidence of negligence to justify the court in submitting the case to the jury, and the motion to direct a verdict was properly overruled."

In the light of the above mentioned authorities, and under the facts and circumstances in evidence, we are of the opinion that the trial court was fully warranted in submitting to the jury the question whether the City was guilty of negligence in maintaining in the public street, Wentworth avenue, the pole in question as it did, with a hole therein less than five feet above the sidewalk and with the alternate steps thereon (all making it convenient and attractive for boys in their play to climb the pole) and with a lamp and reflector near the top of the pole, which reflector was in some way connected with wires carrying a heavy load of electricity. And we think that the question whether the pole, located in the public street and constructed and used by the City as shown, was so attractive to children in their play as to suggest the probability of such an accident as actually occurred, was also a question for the jury to decide.

Counsel for the City also contend that the evidence discloses such a want of proper care, both on the part of the boy in climbing the pole and on the part of his parents in allowing him to be upon the streets at a late hour of the evening, as bars any recovery in the case. We cannot agree. In the opinion in the Denning case, supra, (p. 343) it is said: "The law is clearly established by the great weight of authority that the question of culpability of a child between the ages of seven and fourteen is an open question of fact, and must be left to the jury to determine, taking into consideration the age,

1. The following information was obtained from the files of the Federal Bureau of Investigation, New York City, New York, on the subject of the above-captioned case:

Now, notwithstanding these facts, we still find that the

Under the latter and previous case in witness, as one of the
evidence that the trial court was fairly warranted in concluding
to the fact that the question whether the fact was really in public view
is material in the public interest, therefore, the fact
is material as it is, with a note therein from the fact
about the character and with the character of the person (all
which is convenient and distinctive for the fact that it
shows the fact) and with a long and reflection near the top of the
note, which reflection was in some way connected with other writings
a heavy load of electricity. And we think that the question whether
the fact, located in the public interest and connected and used by
the fact as shown, was so effective as to show in their fact as to
prevent the probability of such an incident as actually occurred.

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to the fact that the law is not a mere declaration of fact, but that it is a declaration of a principle of justice, and that it is a declaration of a principle of justice which is binding upon the conscience of every man.

capacity, intelligence and experience of the child." (Citing Maskaliunas v. Chicago & Western Indiana R. Co., 318 Ill. 142, 150.) And, as also said in the Beming case (p. 344), "whether deceased was in the exercise of due care at the time of the accident, and whether his negligent conduct was the proximate cause of his injury were questions properly submitted to the jury under the evidence." And we think that whether the parents of the boy were guilty of any negligence, and whether their negligence, if any, was the proximate cause of his injuries, were, under the evidence, questions for the jury to decide.

On the trial the court gave to the jury eleven instructions, - five being offered by plaintiff and six by defendant. Counsel for the City complain of all five offered by plaintiff. We have reviewed them and counsel's arguments relating to each of them, and do not think that any are so erroneous, if erroneous at all, as warrants a reversal of the judgment. The bill of exceptions discloses that, after the court had given said instructions as a series to the jury, defendant requested the giving of eight peremptory instructions that they find it not guilty as to each of the eight counts of plaintiff's declaration. The court properly refused the requests. They came too late. (Peirce v. Walters, 164 Ill. 560, 565; Chicago, etc. R. Co. v. Murowski, 179 id. 77, 79; Chicago, etc. R. Co. v. Mohan, 187 id. 281, 282.) Furthermore, each of the last four of the counts in plaintiff's declaration alleged in substance that the pole was a nuisance, attractive to children, and one of the issues of fact on the trial was whether it was or not, and, in our opinion each of said last four counts are sufficient to sustain the judgment.

Finding no reversible error in the record the judgment of the Superior Court is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

of the reporter Court is affirmed.

Finding no reversible error in the record the judgment of said last Court is affirmed in whole the judgment on the trial was whether it was or not, and, in my opinion each a nuisance, attractive to children, and one of the houses of two in plaintiff's declaration alleged in substance that the pole was 14. 281. 282.) Furthermore, each of the last four of the counts

Hawkins, 178 14. 77. 78; Williams, 181 14. 79. 80. 81. 82.

(Police v. Williams, 181 111. 280, 281; Williams, 181 111. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

The court properly returned the verdicts. They come too late.

guilty as to each of the eight counts of plaintiff's declaration. Giving of eight peremptory instructions that they find it was instructions as a matter to the jury. Defendant requested the bill of exceptions discussed last, after the court had given said

verdicts as all, as returns a verdict of the judgment. The each of them, and he not think that any are so erroneous, if

first. We have reviewed them and counsel's arguments relating to and. Counsel for the city complains of all five errors by plain- statements, - five being offered by plaintiff and six by defend-

On the trial the court gave to the jury eleven in-

vidence, questions for the jury to decide.

it say, was the proximate cause of his injuries, were, under the

the boy was guilty of any negligence, and whether their negligence,

under the evidence." And we think that whether the parents of

cause of his injury were questions properly submitted to the jury

negligent, and whether his negligent conduct was the proximate

became was in the exercise of due care at the time of the

188.) And, as also said in the leading case (p. 244), "whether

negligent, intentional and otherwise of the child." (Citing

245 I.A. 615 #1

464 - 31635

HOMER A. PEKIFFER et al.,
Complainants and Appellees,

v.

RICHARD G. KEMPER et al.,
Defendants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

ON APPEAL OF CHURCH EXTENSION
BOARD OF THE PRESBYTERY OF
CHICAGO, a corporation,
Intervening Petitioner and Appellant.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a partition decree, entered by the Circuit court of Cook county on June 25, 1926. Another appeal, Case No. 31634, was taken from the same decree by Richard G. Kemper, one of the defendants to complainants' bill. The two appeals were consolidated. An opinion has this day been filed in case No. 31634. For the reasons stated in that opinion, to which reference is made, the decree is reversed and the cause is remanded to the Circuit court with directions to overrule the exceptions to the amended answer of Kemper and wife to complainants' bill, overrule complainants' demurrer to the Kempers' amended cross-bill, and allow the intervening petition of said Church Extension Board and the other three religious corporations to be filed, etc., and that the claimed rights of said Church Board, and the other beneficiaries named in the written instrument of July 21, 1914, be considered and adjudicated, etc., and that such further proceedings be had, not inconsistent with the views expressed in said opinion in case No. 31634, as to equity may appertain.

REVERSED AND REMANDED WITH DIRECTIONS.

Fitch and Barnes, JJ., concur.

2421.A.615

500 - 2115

WILLIAM A. HARRIS, JR.,
Comptroller and Treasurer

2

WILLIAM A. HARRIS, JR.,
Comptroller and Treasurer

ON ADOPTION OF RESOLUTION
PASSED BY THE BOARD OF
DIRECTORS, A CORPORATION,
Authorizing Acquisition and Sale

MR. HARRIS, IN THE FIRST PLACE, THE BOARD OF THE COMPANY,

This is an appeal from a resolution passed, entered by the

Board of Directors of the Company on June 25, 1930. The appeal

was for \$1000, and taken from the same source as the appeal of \$1000.

One of the resolutions is explanatory of the fact that the two appeals were

submitted. In addition, this day being filed in case No. 1000.

For the reasons stated in this appeal, the Board of Directors is asked

the Board is requested and the Board is requested to the Board

to take such action as to the Board is requested to the Board

amount of money and also to the Board is requested to the Board

to take such action as to the Board is requested to the Board

The Board of Directors of the Company is requested to the Board

to take such action as to the Board is requested to the Board

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338 - 31470

WILLIAM R. STEINBERG,
Appellant,

v.

GEORGE TURNER,
Appellee.

59 9/1a 245 I.A. 615 #2
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE BANKS DELIVERED THE OPINION OF THE COURT.

The judgment appealed from was rendered upon an instructed verdict for defendant at the close of plaintiff's case.

The statement of claim set forth a written contract under which the parties operated, and alleged that plaintiff had advanced \$1710.11 on account of, and in excess of, commissions earned by defendant under said contract, for the return of which this suit was brought.

The contract in question reads as follows:

"Oct. 10, 1919.

Agreement between Mr. Wm. R. Steinberg and Mr. Geo. Turner with reference to the selling of the products of the Buffalo Knitting Co.

Mr. Steinberg and Mr. Turner are to work jointly the city of Chicago and the state of Illinois and Indiana, plus any additional territory which may be obtained.

* * * * *
Commissions: The Buffalo Knitting Co. are to pay a commission of five per cent (5%) on all goods shipped and this commission is to be divided as follows on all goods shipped for the joint account of Steinberg and Turner, viz:

Mr. Steinberg to receive 1%.

Mr. Turner to receive 4%.

If a different rate of commission should at any time be arranged such commission is to be divided as follows: 20% to Mr. Steinberg and 80% to Mr. Turner.

Payment of commission: Mr. Steinberg agrees to pay Mr. Turner 60% of his (Turner's) share of

3451.A.812

ATTACHED WITH ORIGINAL
COPIES TO BE MADE

APPROVED

WILLIAM A. HARRIS

CHIEF OF BUREAU

U. S. DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

SEPTEMBER 10, 1912

RE: JAMES EARL RAYMOND, ALLEGEDLY THE CHIEF OF THE GANG.

The following information was received from the
investigation conducted for the purpose of ascertaining
the identity of the person known as the "Boss" of the
gang.

The statement of John W. Ray, a witness in the
case, shows that the person known as the "Boss" of the
gang was a man of about 40, and of the name of J. W. Ray,
and was known to the witness as the "Boss" of the gang.

This case is being handled.

The Bureau is keeping a close watch on the case.

Very truly yours,

WILLIAM A. HARRIS
CHIEF OF BUREAU
U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

Enclosed for the Bureau are two copies of a
report of the Chicago Police Department, dated
September 10, 1912, and a copy of a letterhead
report of the Chicago Police Department, dated
September 10, 1912.

It is suggested that the Bureau should be kept
advised of any further information received from
the Chicago Police Department, and that the Bureau
should be kept advised of any further information
received from the Chicago Police Department.

Very truly yours,
WILLIAM A. HARRIS
CHIEF OF BUREAU
U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

commission accruing on orders booked, such payments to be made on the 5th of each month following bookings.

The balance of 40% of Mr. Turner's share of commissions to be paid on the 5th of each month following shipment.

* * * * *
Mr. Turner agrees to use his best efforts and his time for the sale of the products of the Buffalo Knitting Co.

This agreement to continue for the period of two (2) years from date unless previously terminated by mutual agreement."

The main issue calls for a construction of the contract, whether the basis of the division of the commissions earned by the parties jointly was a percentage of commissions upon orders booked, as claimed by defendant, or commissions upon orders shipped, as claimed by plaintiff.

The undisputed facts in evidence are that plaintiff was a general salesman for various firms in various lines, including the Buffalo Knitting Company, with which he had a verbal contract to handle its goods. Plaintiff maintained an office and Turner had desk room therein. The duties he performed under the contract were to solicit orders for the Buffalo Knitting Company, which plaintiff sent on to Buffalo for its acceptance. If accepted, Steinberg would receive a confirmation of the acceptance, and an entry thereof was made in a book either by Steinberg's stenographer or by Turner. The orders solicited for the Buffalo Knitting Company were mostly for what was called "seasonable merchandise," and under the course of dealings it was customary for shipments not to be made for many months afterwards. Many of the orders were canceled by the customers and the cancellations accepted by the Buffalo Knitting Company, a privilege with which Steinberg had nothing to do.

Steinberg advanced to Turner \$400 on November 26, 1919,

Commissioner receiving an order dated, from the
to be made on the 1st of each month following

The balance of 1844 of Mr. Turner's share of
Commissioner to be paid on the 1st of each month
following payment.

Mr. Turner agrees to use his best efforts and
his time for the sale of the products of the British
Whaling Co.
This agreement to continue for the term of five
(5) years from date unless previously terminated by
mutual agreement.

The main issue was for a continuation of the contract.
Whether the result of the division of the commission earned by the
parties jointly was a percentage of commission upon sales
received, as claimed by defendant, or commission upon sales
received, as claimed by plaintiff.

The undisputed facts in evidence are that plaintiff
was a general salesman for various times in various places, in-
cluding the British Whaling Company, with which he had a verbal
contract to handle the goods. Plaintiff maintained an office
and Turner had been some time. The duties he performed under
the contract were to collect orders for the British Whaling
Company, which plaintiff sent on to Britain for its execution.
It appeared, although never received a confirmation of the
agreement, but an entry thereof was made in a book owned by
plaintiff, and signed by Mr. Turner. The orders collected for
the British Whaling Company were mostly for what was called
"economic merchandise," and when the order of dealing is
was necessary for defendant not to make the same month
afterwards. Many of the orders were cancelled by the company,
and the cancellations received by the British Whaling Company.
A privilege with which plaintiff had dealing to do.

\$2000 on January 9, 1920, and \$2000 March 2, 1920, a total of \$4000. He received from the Buffalo Knitting Company \$3626.31 as commissions on merchandise shipped by said company on the orders placed with the company through the parties to this suit under said contract. The arrangement between Steinberg and Turner ceased sometime in October, 1920.

Steinberg testified that on each of the occasions when he made payments to Turner as aforesaid, it was upon Turner's request, expressing his need of money, and that he told Turner that he would let him have the money upon the understanding that he was to pay back whatever was overdrawn; that the business was strictly on a commission basis, and that Turner replied: "It is thoroughly understood that all commission men work on that basis," and that he would have to account for all money that was overdrawn at the end of the year, and if there was any coming at the time when all of the shipments were made Steinberg would pay Turner what was coming to him.

It will be noted, as recited in the agreement, that the Buffalo Knitting Company under its contract with Steinberg was to pay him a commission of 5 per cent on all goods shipped, and by agreement between the parties it was that commission that was to be divided on the basis of one-fifth for Steinberg and four-fifths for Turner. As to the time of payment the contract provided that Steinberg should pay Turner "60 per cent of his (Turner's) share of the commission accruing on orders booked," on the fifth of each month following "bookings," and the balance of 40 per cent of Turner's share on the fifth of each month following shipments. As one part of the agreement provides for the division of the commission Steinberg was to receive

... on January 1, 1935, and 1936, a total of
... received from the United States Treasury Department
... on commission on securities shipped by said company on the
... through the parties to this sale
... The agreement between
... in London, 1935.

... that on each of the occasions

... in January, 1935, it was found that
... need of money, and that he had
... the money upon the understanding that
... was provided that the balance was
... and that Turner replied "It is
... all commission was paid on that basis."
... for all money that was overdrawn
... and it was not until the end of the year,
... which would pay Turner
... to him.

It will be noted, as stated in the agreement, that

... the United States Treasury Department with the following
... of 2 per cent on all funds received.
... and by agreement between the parties it was that commission that
... was to be divided on the basis of one-third for Weinberg and
... two-thirds for Turner. In the case of payment the balance
... provided that Weinberg should pay Turner "the full amount of his
... (Turner's) share of the commission received on securities received."
... and the balance
... of 50 per cent of Turner's share on the fifth of each month
... following agreement. As we said in the agreement provided
... for the division of the commission Weinberg was to receive

31470

*Specimen filed June 7/38
Per: Judge*

*June 2/38 Modified by taking
Judge here and entering
an order Per: Judge*

therefore, to receive extrinsic evidence as to the intent of the parties. From the evidence recited, which is undisputed, it was manifestly the intention of the parties, and their construction of the contract, that the basis of the commission was to be upon the goods shipped, and that while advances to Turner, in view of the long period that elapsed between the booking of the orders and the shipments, were to be made, part of them when booked and part of them after shipment, we think the contract contemplated, and that it was the intention of the parties, that their percentage of the commission should ultimately be settled on the basis of the goods shipped. A different construction under the facts of the case would hardly be consistent with business-like methods. (With the right of the Knitting Company to accept the cancellation of orders by the customers, one in Steinberg's position, receiving from it only the commission on orders shipped, would hardly undertake to pay most of, and possibly more than, that commission on orders booked, as they were subject to cancellation. That fact must have been taken into consideration, and the parties seem to have so understood. We think, therefore, that the court gave a wrong construction to the contract, and erred in instructing a verdict.

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., Concur.

from said company "on all goods shipped," and further that of the agreement that shipping was to pay a portion of Turner's share, retaining as its own liability on goods shipped, and the rest of the commission a month after shipment, there being an understanding as to whether Turner's commission was to be based on "costs" or "shipments." It was contended, therefore, to require evidence as to the intent of the parties. From the evidence presented, which is undisputed, it was manifestly the intention of the parties, and their intention at the time, that the sale of the commission was to be upon the goods shipped, and that this intention is shown, in view of the long period that elapsed between the passing of the order and the shipment, was in no way, part of their understanding and part of their intent, to make the parties contending, and that it was the intention of the parties, that their percentage of the commission should likewise be so fixed on the basis of the goods shipped. A different conclusion under the facts of the case would hardly be consistent with business-like methods. With the right of the existing language to support the conclusion of intent by the agreement, and in defendant's position, receiving from it only the commission on goods shipped, would hardly amount to a part of it, and possibly more than that commission on goods shipped, as they were subject to cancellation. That fact must have been taken into consideration, and the parties seem to have so intended. We think, therefore, that the court gave a correct conclusion to the contract, and acted in exercising a proper discretion in its judgment.

from said company "on all goods shipped," and another part of the agreement that Steinberg was to pay a portion of Turner's share, referring to it as "accruing on orders booked" and the rest of his commission a month after shipment, there arises an ambiguity as to whether Turner's commissions were to be based on "bookings" or "shipments." It was competent, therefore, to receive extrinsic evidence as to the intent of the parties. From the evidence recited, which is undisputed, it was manifestly the intention of the parties, and their construction of the contract, that the basis of the commission was to be upon the goods shipped, and that while advances to Turner, in view of the long period that elapsed between the booking of the orders and the shipments, were to be made, part of them when booked and part of them after shipment, we think the contract contemplated, and that it was the intention of the parties, that their percentage of the commission should ultimately be settled on the basis of the goods shipped. A different construction under the facts of the case would hardly be consistent with business-like methods. With the right of the Knitting Company to accept the cancellation of orders by the customers, one in Steinberg's position, receiving from it only the commission on orders shipped, would hardly undertake to pay most of, and possibly more than, that commission on orders booked, as they were subject to cancellation. That fact must have been taken into consideration, and the parties seem to have so understood. We think, therefore, that the court gave a wrong construction to the contract, and that plaintiff is entitled to recover from defendant the excess paid him over and above his percentage of commissions on the orders shipped, which, as the evidence shows, is \$1699.95. We shall allow

...and ...
...of the ...
...Tanner's ...
...and the ...
...which ...
...be based on ...
...however, ...
...the ...
...it was ...
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...was to be ...
...Tanner, in ...
...holding of ...
...of them ...
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...parties, ...
...ultimately ...
...different ...
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...statement, ...
...the ...
...and ...
...as they ...
...enter into ...
...unaffected. ...
...communication ...
...is ...
...his ...
...as the ...

interest only from the date the correct judgment should have been entered, namely, February 26, 1926, as we cannot understand the reason for five years delay to bring the case to trial, or that it can be attributed to defendant.

Accordingly judgment is entered here for \$1723.99.

REVERSED AND JUDGMENT HERE FOR \$1723.99.

Gridley, P. J., and Fitch, J., Concur.

interest only from the date the interest should have been received, namely, February 22, 1932, to the amount paid to the person for the same date as being the date of trial, as this is not an admission of liability. Accordingly judgment is entered for the \$125.00.

REVEREND AND HONORABLE THE JUDGE.

CHAS. J. J. and FRANK J. J. J.

CHAS. J. J. and FRANK J. J. J.

CHAS. J. J. and FRANK J. J. J.

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CHAS. J. J. and FRANK J. J. J.

CHAS. J. J. and FRANK J. J. J.

338 - 31470

FINDINGS OF FACT.

We find that it was the intention of the parties to the contract in question that the plaintiff was to advance to defendant his percentage of the commissions on the understanding that if they exceeded such percentage on the basis of the goods shipped, defendant was to return any surplus thereafter advanced to him, and that plaintiff advanced to him over and above defendant's percentage of the commissions on the goods shipped the sum of \$1699.95.

100 - 1000

THEORY OF THE

It is clear that the intention of the parties
to the contract is to make the liability one in
advance to determine the person to be the commission
on the contract. It is clear that the parties
on the basis of the contract. It is clear that the parties
any further that the contract is one in advance to
determine the person to be the commission of
the commission on the basis of the contract.

599245 I.A. 615*

385 - 31517

STATE OF ILLINOIS ex rel.,
BORDEN'S FARM PRODUCTS CO.,
of Illinois, a corporation,
et al., (Petitioners),
Appellees.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

v.

THE VILLAGE OF OAK PARK et al.,
(Respondents),
Appellants.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a petition for a writ of mandamus to compel the Village of Oak Park, its president, board of trustees and building commissioner to issue a building permit to erect a building to be used for a milk bottling and milk distributing station upon certain lots in said village.

The trustees filed a demurrer to the petition, which was overruled. The building commissioner filed pleas thereto, and the village and president of the board of trustees answered. Replications, rejoinders and demurrers followed in order, and the demurrers were carried back and sustained to the pleas and answer, and overruled as to the petition. Subsequently the petition was amended, and the issues were reformed by demurrer of the village trustees and allowing the amended answer of the village and its president, and the pleas of the commissioner to stand as the answer and pleas, respectively, to the amended petition. Petitioners demurred to the answer and pleas, and on respondents' motion petitioners' demurrers were carried back to the amended petition. On the hearing the several demurrers to the amended petition were overruled and those to the amended answer and pleas sustained. Respondents electing to stand by

their respective pleadings, the order for the writ was entered, from which this appeal is taken, thus presenting for consideration the sufficiency of the amended petition and of said answer and the pleas thereto.

Respondents appeared by the same attorneys, and have complicated the presentation of the issues unnecessarily by severance of the pleadings, as the several officials were not called upon to act in the matter in a mere ministerial or a private capacity, but as agents for the village. While it was competent to make them parties, it would have been sufficient to have filed the petition against the village alone without naming them (People ex rel. v. Getzendaner et al., 137 Ill. 234, 263; People v. Raymond, 136 Ill. 407, 423; Sheaff v. People ex rel., 87 Ill. 189, 195); and as it is the action of a corporate body and not that of natural persons that the petition seeks to enforce (Getzendaner case supra, and authorities there cited,) all the defenses presented could have been made by the village, and the several officials could have appropriately joined therein. In fact, appellants say in their brief that the "cases for respondents" relate to the "shortcomings" of the amended petition, and to the sufficiency of the pleas and of the answer, raised by the several demurrers, and that the questions of law thus raised, as well as those of fact raised by the pleas and answer, are "practically identical," and appellants treat them as such in their argument. In view of such admission, and the fact that a comparison of the various defenses discloses that those mainly relied upon, if not all that are worthy of consideration, are covered by the averments and denials of the answer, we shall first consider the sufficiency of the amended petition and the answer thereto.

The petition is predicated upon a corporate duty to

their respective pleadings. The order for the writ was entered.
Then with this appeal as taken, then presenting for consideration
the petition of the amended petition and of said answer and
the other parties.

Respondents appeared by the same attorneys, and have
submitted the presentation of the issues unnecessarily by
overviews of the pleadings, as the several officials were not
called upon to act in the matter in a more ministerial or a
trivial capacity, but as officers for the village. This is not
content to make them parties, it would have been sufficient
to have filed the petition against the village alone without
making them parties as in Ex. v. Respondents at 111, 117, 118.
111, 117, 118; Ex. v. Respondents, 111, 117, 118; Ex. v.
Respondents at 111, 117, 118; and as it is the action of
a corporate body and not that of natural persons that the
petition seems to require Respondents as parties, and
petitioners (as also cited), all the persons presented could
have been made by the village, and the several officials could
have appropriately joined thereto. In fact, appellants say
in their brief that the "cases for respondents" relate to the
"absorption" of the several villages, and to the villages
of the place and of the answer, joined by the several respondents,
and that the questions of law have raised, as well as those of
fact raised by the place and answer, are "practically identical."
and appellants treat them as such in their argument. In view
of such admission, and the fact that a comparison of the various
defenses discloses that those mainly relied upon, it not all that
are worthy of consideration, are covered by the arguments and
details of the answer, we shall first consider the sufficiency
of the amended petition and the answer thereto.
The petition is presented upon a corporate body to

issue the building permit. Omitting formal matters not in question, the petition, as amended, recites that one of the petitioners, the Borden Company, is engaged in the business of milk bottling and milk distributing, for which it seeks to erect a building on certain property in the Village of Oak Park, and that it has entered into a contract to purchase the property from the joint petitioner, Ridgeland Coal & Ice Company. It sets forth sections 416, 417, 419, and 420 of the village building ordinance or code, which provide among other things that permits must be obtained by the owner or his agent from the building commissioners, and if operations are not begun within six months after a permit is granted it shall be void until an extended permit shall be taken out, and that applications therefor shall be made by the owner or his agent to the building commissioner, accompanied by plans and drawings to be approved by the building commissioner, and certified to by an architect to be in compliance with the building ordinances.

The petition then sets forth a section of a zoning ordinance passed by the village in pursuance of the Zoning Act, providing that the board of appeals shall exercise such functions as may thereafter be prescribed by ordinance in conformity with the Zoning Act.

The petition then alleges that the property is located in a commercial district of said village; that the building commissioner rendered a decision that the building proposed to be erected was prohibited in a commercial district; that thereupon said Borden Company filed an application January 31, 1925, with the board of appeals, which, after a hearing had on February 17, 1925, entered an order or resolution "that the Board of Appeals does hereby make a variation of the application

from the building project. Building Towns, which was in
possession, was building, as shown, building that was at the
petitioners, the building project, in progress in the business of
only building with the building project, for which it was in
order a building as shown in the village of the town.
and that it was ordered into a building to purchase the property
from the building project, building project & the company. It
was found, building project, building project, and the village
building project as shown, which provided among other things
that building project was ordered by the owner of the building
the building project, and it was ordered as not shown
which was ordered after a hearing is provided it shall be void
which an ordered building project shall be shown not, and that application
building project shall be made by the owner or the agent to the building
committee, accompanied by plans and drawings to be approved
by the building committee, and provided to be an ordered
to be in building with the building project.
The building project shall be made a section of a building
ordered project to the village in progress of the building project.
provided that the building project shall be ordered as shown not
as the building project be provided by building project in building with
the building project.
The building project shall be made that the property is ordered
in a building project of the village that the building
committee ordered a building that the building project be
be ordered as provided in a building project that
the building project shall be ordered as shown not January 15.
1935, with the building project, which, after a hearing had
on February 17, 1935, ordered an order or resolution that the
building project shall be ordered as shown not a resolution of the building

of the Commercial District regulations of the Zoning ordinance, and that the application for a permit be and the same is hereby granted, Provided, however, that the building permit therefor be taken out within six (6) months from this date, and provided also that all requirements of the building code be fulfilled;" that thereafter on July 14, 1925, said board of appeals extended the time for taking out said permit three months from the expiration of the time granted on February 17, 1925; that no petition for a review of the order of February 17, 1925, or that of July 14, 1925, was filed within thirty days, as required by statute; that on November 14, 1925, (being within said nine months) the petitioners made application for said permit to the commissioner of buildings, submitting its plans in accordance with the requirements of the building code as to construction, and tendered the fee required under the building code; that the commissioner refused to grant the permit on the ground that petitioners did not have the frontage consents required by the building code of the village, but exercised the right provided for under the building code "to reserve its final decision until same is approved by the village board in all cases in which he is in doubt as to the proposed work being in accord with or covered by the requirements of this ordinance;" that thereafter the application was submitted to the president and board of trustees, which refused to grant the permit, stating as their reason for refusal that the application was not accompanied by frontage consents required by section 963 of the building ordinance, which declares the keeping of more than ten horses at any barn at one location for business purposes requiring the use of such horses between certain hours would be a nuisance when located within a residence district of the village, and

of the present and future relations of the building to the village, and that the application for a permit to use the same is hereby granted, provided, however, that the building permit application be taken out within six (6) months from this date, and provided also that all requirements of the building code be fulfilled. That therefore on July 14, 1933, said permit is hereby extended to the time for taking out said permit under number 17000, and the application of the time granted on February 17, 1933, and no petition for a review of the order of February 17, 1933, is filed at July 14, 1933, was filed within thirty days, as required by statute, and on November 14, 1933, (being within said nine months) the petitioner made application for said permit to the committee of building, obtaining its plans in accordance with the requirements of the building code as to construction, and therefore the fee required under the building code; that the committee refused to grant the permit on the ground that the petitioner did not have the building permits required by the building code of the village, but otherwise the right provided for under the building code to remove the local building code is approved by the village board in all cases in which it is found as to the proposed work being in accord with or contrary to the requirements of this ordinance; that therefore the application was submitted to the president and board of trustees, which refused to grant the permit, stating on their return for refusal that the application was not accompanied by the required documents required by section 112 of the building ordinance, which had the purpose of more than ten years of age from the location for business purposes requiring the use of such houses between certain hours would be a nuisance. That in fact within a reasonable distance of the village, and



that no building permit for the erection of said barn shall be granted unless consent in writing is obtained from the owners of a majority of the property in said district, according to frontage.

The petition then avers that sections 980, 421, 868, 983, 988 and 989 of the building ordinance of said village (none of which is set forth in the petition except 983, but which are set forth in full in the answer) were repealed by the zoning ordinance of said village passed July 30, 1923, which is set forth in full; that the Board of Trustees have refused to issue a permit because of the failure to procure frontage consents where a stable containing more than ten horses is to be constructed; that the ordinance so providing is void; that petitioners have complied with all the lawful provisions of the various ordinances of the village relating to the issuance of a permit for said building; that the building does not violate any of the provisions of said valid ordinances, and that the commissioner, the president and board of trustees in their refusal and failure to grant a permit have abused their discretion, whereby your petitioner is prevented from going forward, etc.

The answer in substance avers that the Ridgeland Coal & Ice Company has no interest or right of action under the facts disclosed; that it does not appear that the Borden's Farm Products Company has any right or title to the lands in question; that no plat in duplicate was filed with any application or presented to said board of appeals, as required by the zoning ordinance; nor were such plans and certificates as are required by the building ordinance at any time filed with or presented to the building commissioner in connection with the application for a permit made January 31, 1925; that on and since said last mentioned date the



that no building permits for the erection of said work shall be granted unless consent in writing is obtained from the owners of a majority of the property in said district, according to the provisions of the Chicago Building Ordinance.

The petition then states that sections 900, 411, 400, 401, 402 and 403 of the Building Ordinance of said village (which is set forth in the petition except 401, but which are not set forth in this bill as amended) were repealed by the ordinance of said village passed July 27, 1924, which is the ordinance in which the Board of Trustees have refused to issue a permit because of the failure to provide for the removal of the building containing more than two houses to be removed. The ordinance so providing is void and unenforceable, and the petitioners with all the local provisions of the various ordinances of the village relating to the issuance of a permit to build buildings that the building does not violate any of the provisions of said ordinance, and that the ordinance, the provisions and Board of Trustees in their refusal and failure to grant a permit have abused their discretion, whereby your petitioners is prevented from being removed, etc.

The answer in substance avers that the Building Ordinance of said village has no interest or right of action under the facts disclosed; that it does not appear that the Board of Trustees of said village has any right or title to the lands in question; that no plan in relation to the building or proposed to be erected on said land of special, as required by the zoning ordinance; nor were such plans and specifications as are required by the Building Ordinance as any time filed with or presented to the Building Commission in connection with the application for a permit made January 21, 1924; and since said last mentioned date the

said building ordinances defining and governing the construction of buildings are in force and effect (referring to sections 416, 417, 419 and 430 set out in the petition, and setting forth in full certain other sections, 401, 402, 415, 421, 868, 980, 983, 988 and 989. It is hardly necessary to set forth all the provisions of these several sections. They declare the use of structures for certain purposes to be unlawful, and their construction a nuisance, and prohibit the erection of certain buildings without written consents, particularly a stable for horses in a residence district, as defined in the ordinance, and declare the keeping of more than ten horses in a residence district at a barn for business purposes between certain hours, etc., a nuisance, and require the filing of such consents with the building commissioner, and that a district plat accompany the application for a permit.)

The answer denies that the "only" reason why the building commissioner rendered his said decision disapproving of the application referred to in the petition was because the improvement was prohibited in the commercial district of said village, but because the alleged application was otherwise defective and insufficient (as above set forth), and avers that no such plat as required by said section 989 was at any time filed with or presented to the commissioner; that the location of the proposed building is within a residence district, as defined in the building ordinance, and that no consent of the property owners in the residence district according to frontage, as required by the building ordinance, was presented to the building commissioner or to the board of appeals.

The answer then avers that the application made January 31, 1925, was not such as is required by the zoning ordinance and the building code of the village, setting forth in what particulars, and that there was nothing before said board upon which it could

lawfully act, that it had no power or jurisdiction to take said supposed action, and that the services of one of the board of appeals as architect were employed by petitioners at the time such matters were pending before the board.

The answer further avers that the requirements of the building ordinances, with which petitioners were required to comply under the order of the board of appeals, have never been complied with; that the board of appeals had no right to grant an extension of time for taking out a permit; that the application of November 14, 1925, was a new and separate document; that the former application of January 31, 1925, had been abandoned; that petitioners' remedy was to appeal from the refusal of their application of November 14, 1925, to the board of appeals which they neglected to do, and denies that the president and village board stated as the reason for the refusal of the permit that the application was not accompanied by frontage consents required by section 983 of the building ordinance, and avers that the plan of operation proposed by the Borden Company required that a nuisance in fact be created and maintained on the premises in question in breach of the ordinance, to the detriment of the health and comfort of residents and school children, and denies that petitioners have complied with all the lawful provisions of the ordinances relating to the issuance of such a permit, referring particularly to the ordinance provision for written consents to construct a barn, etc., in a residence district, and the requirement that a district plat accompany the petition.

It will be observed that many of the averments of the answer go to the jurisdiction of the board of appeals to pass on matters brought to its attention under the application of January 31, 1925. The Zoning Act expressly confers authority

which modern weapons would be used.

DATE OF DEPARTURE: 1968-01-15

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the situation.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

[illegible]

DATE: 10/10/1964

.....

What to consider and what things to not think of

the late change to be made and as, 2001, it referred to no change

They negotiated to sell the property and the proceeds were used to pay the mortgage.

1. The following information is being furnished to you for your information only and is not to be used for any other purpose.

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VALUATION OF THE VINCENNES S&P MINES, INC. 11/1/81

upon the board of appeals to review any decision of the administrative official (here the building commissioner) charged with the enforcement of the zoning ordinance, and to hear and decide all matters referred to it upon which it is required to pass under any such ordinance, and on the hearing of an appeal to reverse or affirm or modify any decision or determination appealed from. To that end it is given all the powers of the officer from whom the appeal is taken; and also the power "to vary or modify the application of any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures or the use of land." If any person is aggrieved by its decision he may have the same reviewed by a court of record. (Section 3 of the Zoning Act, p. 394, Cahill's Stats. of 1925.) Under the Act, therefore, the board of appeals had jurisdiction of the subject matter with respect to which it undertook to act, and apparently of the persons of the parties affected thereby. Whether or not all of the formalities requisite for the assumption of its jurisdiction, which the main part of the answer questions, were complied with was a matter subject to review by writ of habeas corpus, as provided by statute. (People v. Lindblom, 182 Ill. 241.) The petition alleges that no review of the action of the board of appeals was had. This is not denied. Instead of seeking such review by the mode prescribed by statute, respondents have by the answer and pleas made a collateral attack upon the board's decision. Where a tribunal has jurisdiction of a subject matter and the persons of the parties, its judgment or decree or order is binding until reversed, and is not open to collateral attack. (People v. American Life Ins. Co., 267 Ill. 504; Matthews v. Boner, 292 Ill. 592.) In the absence of fraud - which is not claimed here - this principle applies to the judgment

of a special tribunal (McLeod v. Receveur, 71 Fed. Rep. 455), and this, although the statutory requirements were not complied with by the tribunal or its officers. (Jackson v. Smith, 120 Ind. 320; Myers v. Warner, 3 Ore. 216; Salisbury v. County, 59 N. H. 359.) It would have been competent on the writ of certiorari to inquire whether the board of appeals had jurisdiction and proceeded legally, i. e., followed the form of proceedings legally applicable in such cases. (People v. Lindblom, 182 Ill. 341.)

So far, therefore, as the answer and pleas aver that there was a non-compliance with the requirements and formalities necessary to bring the question of authorizing a permit before the board of appeals, and so far as their averments raise mere questions of law, they were vulnerable to demurrer. Inasmuch as the order of the board of appeals made February 17, 1925, granting such variation, related to matters within its jurisdiction to determine, and there was no review of that order in the mode prescribed by statute, its validity is not subject to attack in this proceeding. Hence we need not consider whether the preliminary steps to the board's action required by ordinance were fully complied with, or upon what grounds the building commissioner or the board of trustees acted in rejecting petitioners' application of January 31, 1925, or the status of a member of the board of appeals alleged to have been an architect for petitioners. All such matters were open to review on certiorari by the Circuit Court, and cannot be raised collaterally.

As to the alleged non-compliance with the building ordinance so far as it undertakes to restrict the right to use such premises for a milk distributing station in a residence district without frontage consents, it has been held that it is not within the police powers granted to cities and

of a special instance (Hobbs v. Hobbs, 25 Fed. Rep. 483).
and this, although the necessary requirements have not been
with of the instance or its effects. (Hobbs v. Hobbs, 25 Fed. Rep. 483).
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to the contrary, in the matter and also that
there was a non-compliance with the requirements and jurisdiction
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the board of appeals, and as far as their respective roles were
questions of law, they were vulnerable to demurrer. However, as
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such variation, related to matters within its jurisdiction to
decide, and there was no review of that order in the same
called by statute, the validity is not subject to attack in this
proceeding. Hence to meet me, consider whether the preliminary
steps to the board's action required by ordinance were truly com-
plied with, or upon what grounds the validity complained of in the
board of trustees acted in rejecting petitioners' application of
January 21, 1933, or the action of a member of the board of appeals
alleged to have been an obstacle for petitioners. All such
matters were open to review on certiorari by the circuit court, and
cannot be raised collaterally.
As to the alleged non-compliance with the building
ordinance as far as it relates to restricted the right to use
such premises for a milk distributing station in a residence
district without storage permits, it has been held that it
is not within the police powers granted to cities and

villages under the statute, and that the city has no power to declare it a nuisance per se, even though there is to be erected a stable for the delivery horses used in connection therewith. (People v. Village of Oak Park, 268 Ill. 256, 262.) And it was held in Joseph v. Wieland Dairy Co., 297 Ill. 574, 581, that "a stable in which horses are kept, even in a residence district of a large city, is not necessarily a nuisance as a matter of law." What was said in that case may be said here, that "there is no allegation of any fact from which it can be inferred that this stable, when completed and in use, will be conducted in such a way as to be a nuisance," or that the property of adjoining owners will be depreciated or their comfort in any way interfered with.

But it appears from the order of the board of appeals that the district in question is not a residence district to which the ordinance provisions as to the erection of a barn pertain, but a commercial district; and while the zoning ordinance excluded the erection in a commercial district of a milk distributing station, a variance in that respect was made by the order or resolution of the board of appeals as aforesaid.

Certain other averments of the answer are tantamount to a collateral attack upon the decision of the board of appeals, that the Ridgeland Company has no right of action, and the Borden Company no right or title to the land in question. These averments are predicated on the ordinance requiring the application for a building permit to be made by the owner or his agent. As it is not questioned that the Ridgeland Company was the owner, there would appear to be no reason why the permit cannot be issued to it. But regardless

...that the city has no power to
decide it is a nuisance not as to be dropped
a matter for the delivery person and in commercial districts.
(People v. Williams of Oak Park, Ill. 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

of what construction should be put on this provision of the building ordinance, or the provision as to the extension of time for issuance of the permit, we think they were questions reviewable by certiorari, and in the absence of such a review cannot be raised collaterally, as attempted by the answer and all of the pleas except 3 and 4. As to all such matters the decision of the board must be deemed final. The answers and the pleas, therefore were vulnerable to petitioners' demurrer so far as they attack collaterally the decision of the board of appeals.

But the decision of the board of appeals manifestly contemplated that so far as the structural requirements of the building ordinance are concerned, the application should be re-submitted to the building commissioner. While the board authorized the permit, it was upon condition "that all requirements of the building code are fulfilled." Accordingly a new application was presented to the commissioner, November 14, 1925, to which the Ridgeland Coal & Ice Company was a party for the first time. Petitioners allege that they then complied with such requirements as are valid. The answer and the third and fourth pleas denied compliance therewith and thus properly raised a question of fact as to whether or not the requirements of the building code, so far as applicable, were fulfilled, as required by the resolution of said board. We think to that extent they were not demurrable.

Holding, as we do, therefore, that the original petition made by the Borden Company was supplanted by the joint petition presented to the building commissioner November 14, 1925, and that such petition should have been accompanied by the proper plats, etc., as required by the building ordinance, showing fulfillment of the requirements thereof, and that an issue of fact was duly

taken both by the answer and the pleas as to the fulfillment of such requirements, we must hold the demurrer to the answer and pleas, being general, should have been overruled.

For do we think the petition was vulnerable to a general demurrer. But in view of what we have said the order for the writ must be reversed and the cause remanded. We cannot refrain, however, from suggesting that the issues be reformed and simplified in accordance with the views herein expressed.

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

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417 - 31549

ERNEST AHMERT et al.,
doing business as
FRANK REILLY & CO.,
Appellees,

v.

ELIZABETH GLOOR,
Appellant.

245 I.A. 615^{#4}

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a bill in equity by complainants asking for the return of \$2500, alleged to have been paid as earnest money under the terms of a contract to purchase certain real estate from defendant Elizabeth Gloor, and praying for a cancellation and nullification of said contract. Frank K. Reilly, the real estate broker in the transaction, was also made a party defendant, complainant claiming the right to recover from each of the defendants. The bill was dismissed as to Reilly for want of equity.

The decree found that complainant was induced to pay to defendant, by and through her agent Reilly, the sum of \$2500, upon false representations inserted in the contract drawn up in said agent's office as to the amount of the monthly rentals under the leases of the building contracted for, of which defendant had knowledge, and that she concealed the truth from complainant until the date when they were about to close the deal.

No contention is made that such finding is not supported by the evidence heard before the chancellor. Reversal seems to be sought on the ground that defendant Reilly alone was personally obligated to return the earnest money. Authorities are cited where a broker in a real estate transaction, who gave a receipt for the earnest money agreeing therein to refund the same under certain conditions, was held liable. Not only is there no such express

2451.A. 615

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417 - 1111

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This is a bill in which the complainant claims that the value of \$2000, alleged to have been paid on account money under the terms of a contract to purchase certain real estate from defendant Elizabeth Olson, and paying for a cancellation and nullification of said contract. James E. Kelly, the real estate broker in the transaction, has also made a party defendant, complaining claiming the right to recover from each of the defendants. The bill was dismissed as to Kelly for want of equity.

The answer found that complaint was induced to pay, to defendant, by and through her agent Kelly, the sum of \$2000, upon their representation inserted in the contract drawn up in said agent's office as to the amount of the said real estate and the terms of the bill. The defendant has, at all times, acted as a broker, and that the contract was drawn from defendant, Kelly. The bill was then dismissed as to Kelly for want of equity.

It is considered to be that said bill is not properly served by the defendant named herein and defendant. However, some to be made on the ground that defendant Kelly acted not properly alleged to receive the account money. Authorities are cited where a broker in a real estate transaction, who gave a receipt for the account money expressing therein to receive the same under certain conditions, was held liable. Not only is there no such express

agreement on the part of the broker Heilly, but it is immaterial so far as defendant Gloor's liability is concerned whether he is obligated to refund the money or not, or whether he is liable to his principal, Mrs. Gloor. The evidence is conclusive that Heilly was Mrs. Gloor's agent in the transaction; that one of his employees, who attended to the preparation of the contract in question, inserted therein false statements as to the amount of the monthly rentals received from the building in question; that the rentals were about \$1000 a year less than represented in the contract; that the vendor, Mrs. Gloor, had, or was chargeable with, knowledge of the falsity of this statement; that one of the inducements of complainants to enter into the contract was the amount of rentals as represented in the contract; that when it came to closing the transaction they learned for the first time of the falsity of the recitations in the contract with regard thereto and refused to go on with the contract without a different adjustment, which was not made; that they made a demand for the return of the earnest money, and it not being received, filed this bill.

There is practically no controversy about these facts. Under them we have no doubt that complainants were entitled to the return of the earnest money paid under such misrepresentations. Not only would defendant be liable for the acts of her agent who drew up the contract and knew the falsity of the statements therein, but she would be liable by reason of personal knowledge of the same. The contention that appellant was misled by her agent, who told her it was "all right" and he would attend to the matter, has no bearing on the question of her liability. Nor does the fact that he was to be paid his commission out of the earnest money and was not entitled to a commission under the circumstances, affect the question of her liability to complainants. And whether the agent is liable to her is not before us.

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The contention that because defendant Gloor did not sign the contract until drawn up in changed form, it amounted to a counter-proposal accepted when signed by complainants, wholly ignores the basis of fraud on which the bill is predicated.

The decree calls for the payment of the sum of \$2500, with interest at 5 per cent per annum from the date of said contract, June 17, 1922, when the earnest money was paid. It is urged that because the decree is not for a specific sum but is thus left for computation it is void. While subject to criticism, it was sufficiently certain to determine by computation the amount required to be paid. In a similar case the court upheld the decree on the doctrine "that is sufficiently certain which can be made certain." (Phillips v. Edsall et al., 127 Ill. 535.)

The decree will be affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

599245 I.A. 615 #5
14a

FRED BRUCE,
Appellee,

vs.

O. O'ROURKE and PHIL GRAUER,
Trading as O'ROURKE AUTO SALES CO.,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The statement of claim herein is for "\$330 deposited with defendant company on one Willys-Knight auto," and alleging that defendant refused to deliver the auto and the deposit.

The affidavit of merits is by Laurence O'Rourke, admitting that he is the party sued as "O. O'Rourke" and alleging that he is the sole owner of the business conducted under the name of the O. O'Rourke Auto Sales Co., and that defendant Grauer was employed by him as a salesman; that said deposit was received by the latter as his agent on the purchase of such a car for \$1000, and that plaintiff not desiring to complete the purchase, released his claim to said car on an agreement that he should have credit therefor on the purchase of another car within six months, and affiant denies that there is any joint liability.

There was a finding and judgment entered against defendants "O. O'Rourke and Phil Grauer" for said sum, from which Laurence O'Rourke and Phil Grauer have appealed. No change, however, was made in the pleadings as to the names of the parties.

The evidence supports the affidavit of merits. It shows that Laurence O'Rourke was the sole owner of said auto sales company, and that Grauer was a mere salesman and acted solely as agent in the transaction in question, and that the sale of the car, the release of the title thereto, the deposit of said money, and

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by the latter as his agent on the purchase of goods for \$1000.

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shows that Lawrence O'Boyle was the sole owner of said auto.

agent in the transaction in question, and that the sale of the car.

the release of the little shrews, the deposit of said money, and

the memorandum of credit were each as alleged in the affidavit of merits. There was no attempt to prove joint liability. For that reason alone the judgment must be reversed. The reversal of the judgment, however, does not prevent bringing an action against Laurence O'Rourke for the return of the money. We cannot, however, pass on his liability upon this state of the record.

REVERSED WITH FINDINGS OF FACT.

Gridley, P. J., and Fitch, J., concur.

THE 10-STEP PLAN FOR SUCCESS

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426 - 31558

FINDINGS OF FACT.

We find that Laurence O'Hourke was the sole owner of the O'Hourke Auto Sales Co., and that defendant Phil Grauer was his agent, and that the money sued for was deposited on a transaction with Laurence O'Hourke only.

245 I.A. 616^{#1}

142-31272

CLARA S. ARENS, administratrix
of the Estate of JOHN M. ARENS,
deceased,

DEFENDANT IN ERROR,

vs.

WILLIAM WANDELL and ERNEST WHITTAKER,
administrators of the Estate of
MARY W. WALLACE, deceased.

PLAINTIFF IN ERROR.

WRIT OF ERROR TO
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Monday, June 13, 1927.

STATEMENT OF THE CASE.

This is a suit, in the Municipal Court, for real estate commissions. It is claimed by the plaintiff, Clara S. Arens, administratrix of the estate of her husband, John M. Arens, that he brought about in August, 1919, a sale of certain real estate to one Mary W. Wallace, now deceased, for which he was promised by her the sum of \$2176.50 as commissions. There was a trial before the court, with a jury, and a verdict and judgment for that amount, with costs, in favor of the plaintiff. The judgment provided that it was "to be paid by the administrator in due course of administration out of the assets, if any, of said estate, subsequently discovered and inventoried after July 23, 1924, being the date of the institution of this cause." This writ of error is prosecuted to reverse that judgment.

In the original statement of claim, which was filed on July 23, 1924, it was set forth that Mary W. Wallace, deceased, in August, 1919, promised and agreed to pay John M. Arens \$1,500.00, as and for commission for the sale of

2451 A. 618

ALL-STATE

UNITED STATES OF AMERICA
DISTRICT COURT
SOUTHERD DISTRICT

WILLIAM E. HARRIS, Administrator
of the Estate of JOHN E. HARRIS,
Deceased,
Plaintiff in Error,
vs.
JOHN E. HARRIS, Defendant.

WILLIAM E. HARRIS, Administrator
of the Estate of JOHN E. HARRIS,
Deceased,
Plaintiff in Error,
vs.
JOHN E. HARRIS, Defendant.

Opinion filed Monday, June 12, 1927.

STATEMENT OF THE CASE.

This is a suit, in the Municipal Court, for
will estate commissions. It is claimed by the plaintiff,
John E. Harris, administrator of the estate of his husband,
John E. Harris, that he brought about in August, 1919, a sale
of certain real estate to one Mary V. Wallace, now deceased,
for which he was promised by her the sum of \$150.00 as
commissions. There was a trial before the court, with a jury,
and a verdict and judgment for that amount, with costs,
in favor of the plaintiff. The judgment provided that it was
to be paid by the defendant. It was served at that time.
and at the time, it was at that estate, subsequently the
return and inventory after July 25, 1921, before the date of
the institution of this cause. This was at issue in
presented to reverse that judgment.
In the original statement of claim, which was filed
on July 23, 1924, it was set forth that Mary V. Wallace,
deceased, in August, 1919, promised and agreed to pay
John E. Harris \$150.00, as and for commission for the sale of

her property, 3409-3447 South Leavitt street, Chicago; that the said Arens, acting pursuant to said promise, on August 14, 1919, produced a purchaser for said premises, who was accepted by Mary W. Wallace, and to whom she sold the property; and that no part of the amount had been paid.

On February 14, 1925, the plaintiff filed an amended statement of claim, increasing the amount alleged to have been promised and agreed to be paid, from \$1500.00 to \$2176.50.

The defendants, in their affidavit of merits, allege that Mary W. Wallace died on January 5, 1923; that adjudication, as to claims against her estate, was made on May 7, 1923, in the Probate Court, and the inventory approved on April 11, 1923; that although more than one year had elapsed since the grant of letters to the defendants, the plaintiff had not filed any claim against the estate, and that she was, therefore, barred.

The defendants, in their affidavit of merits, denied that Mary W. Wallace, in August, 1919, or at any time, promised and agreed to pay Arens \$1500.00, or any other amount, as and for commission for the sale of her real estate.

In their amended affidavit of merits, they further alleged that at the time mentioned in the statement of claim, the said Arens was receiver of the real estate in question; that he was appointed as such on October 15, 1918, in two foreclosure cases, one in the Superior Court, and one in the Circuit Court of Cook County, and continued to act as receiver of the real estate by virtue of such appointment, from October 15, 1918, to the date of his death on December 29, 1919;

October 15, 1912, to the date of his death on December 28, 1912;
of the real estate by virtue of such appointment, from
Elliott Grant of Jack Quincy, and continued to act as receiver
for said estate, and in the Superior Court, and one in the
that he was appointed as such on October 15, 1912, in two
the said estate was receiver of the real estate in question;
alleged that at the time mentioned in the statement of claim
In their amended affidavit of notice, they further
real estate.
other amounts, as and for commission for the sale of her
time, provided and agreed to pay same \$1500.00, or any
debted that said T. Williams, in August, 1910, as at any
The defendants, in their affidavit of notice,
the estate, and that she was, therefore, barred.
alleged, the plaintiff had not filed any claim against
year and elapsed since the grant of letters to the
approved on April 11, 1911, that plaintiff was then an
May 7, 1910, in the Probate Court, and the inventory
adjusted, as to claims against her estate, was made on
a claim that Mary T. Williams died on January 2, 1903; that
The defendants, in their affidavit of notice,
to Elliott M.
to have been provided and agreed to be paid, from \$1500.00
amounted statement of claim, increasing the amount alleged
On February 14, 1910, the plaintiff filed an
property; and that no part of the amount had been paid.
received by Mary T. Williams, and to whom she said the
14, 1910, provided a purchase for said business, who was
the said estate, acting pursuant to said promise, on account
her property, \$1500-1500 South Lewis Street, Chicago, Ill.

that as such receiver, and while acting as such, he was incapacitated, under the law, from dealing in the receivership property for his own personal profit or from deriving any profit or benefit therefrom, other than such compensation as might be allowed to him by the court.

When the cause was submitted to the jury, two interrogatories were presented to them. One asked them if they believed from the evidence that Mary W. Wallace promised John M. Arens compensation for procuring a purchaser for her real estate; which was answered in the affirmative; and the other, if they believed John A. Arens found a buyer for the premises in question, which was, also, answered in the affirmative.

On August 14, 1919, Mary W. Wallace, and Edward S. Wallace, her husband, as vendors, entered into a written contract with John Sinkus, as vendee, for the sale of the property here in question. The purchase price was \$72,550.00. The contract contained no provision in regard to real estate broker's commissions. On May 20, 1920, the contract was consummated, the title going to Sinkus and one Rozenski, to whom Sinkus had assigned an undivided half interest.

As to whether Arens procured the sale of the property to Sinkus, and as to what, if anything, was said by the Wallaces in regard to commissions, some of the chief evidence in the case is that of Sinkus, who is the one who signed the contract of purchase. His evidence is substantially as follows: In the early part of August, 1919, when on Leavitt Street, near the property in question, he made inquiries as to who was the owner of the property, and was told by some tenants that the owner was a receiver, who was collecting rents, and whose name was Arens. He then

...and as such receiver, and while acting as such, he was
...indicated, under the law, from dealing in the receiver-
...property for his own personal profit or from receiving
...any profit or benefit therefrom, that this was a necessary
...condition as allowed by him by the court.

When the same was submitted to the jury, two
...interrogatories were presented for them. One asked them if
...they believed from the evidence that Mary E. Wallace
...procured John M. Brown's commission for procuring a
...license for her real estate, which was answered in the
...affirmative; and the other, if they believed John A. Brown
...owned a house for the premises in question, which was, also,
...answered in the affirmative.

On August 14, 1918, Mary E. Wallace, and Edward
...Wallace, her husband, as vendors, entered into a written
...contract with John Atkins, as vendee, for the sale of the prop-
...erty here in question. The purchase price was \$75,000.00. The
...contract contained no provision in regard to real estate
...broker's commissions. On May 20, 1920, the contract was
...amended, the title going to Atkins and one consent, so
...that Atkins had assigned an undivided half interest.
...As to whether Atkins procured the sale of the
...property to Atkins, and as to what, if anything, was said by the
...Wallace in regard to commissions, none of the chief evidence
...in the case is that of Atkins, who is the one who signed the
...contract of purchase. His evidence is substantially as
...follows: In the early part of August, 1918, when on
...Leavitt Street, near the property in question, he was
...inquired as to who was the owner of the property, and was
...told by some persons that the owner was a woman, and
...was collecting rents, and whose name was Atkins. He then

went over to Arens house, and got some information about the property, and the next day met him at his office. Arens told him that he was the receiver and was handling the buildings temporarily. When he asked Arens if the buildings were for sale, Arens said they were, and when he asked what the price was, Arens said he did not know what the price would be, that he would have to see his lawyer and to come back in a couple of days. Later, in the office of B.F.J.Odell, the attorney for Mrs. Wallace, about August 14, 1919, the day the contract of sale was signed, he heard the subject of commission discussed, although he was in the reception room, and the conference was in Odell's private office. There were present there, at that time, Odell, Mary W. and Edward W. Wallace, and Arens. He claimed that he heard Arens say that for producing a customer he was entitled to a commission on the deal; that he heard Mr. Wallace say to Mrs. Wallace, "What are we going to do about this commission?" that he thought Mrs. Wallace said, "I am going to arrange to take care of him." On that occasion, there was some discussion about the price, whether to sell or not at the particular price; He further testified that there were mortgages on each of the thirteen buildings, and that the indebtedness was six or seven months past due, so that the bank was forced to foreclose the mortgages.

The stenographer for Odell and the attorney for Mrs. Wallace in the foreclosure proceedings testified that she was present in Odell's office on an occasion in the summer of 1919, when Mrs. Wallace and Arens were there; that she heard Mrs. Wallace speak about paying a commission. Later, she denied that, and stated that she was not present.

It is the evidence of B. F. J. Odell, the attorney

[illegible]

who not only instituted the foreclosure proceedings for Mary W. Wallace, but obtained the appointment of Arens, as receiver, that in the spring of summer of 1919, Mr. Wallace asked him if he had spoken to the receiver about trying to sell the property; that Mr. Wallace asked him if he told Arens that the Wallaces would pay a commission, and he told him he had; that he suggested to Mr. Wallace that he did not think it was necessary to offer Mr. Arens a full commission; that at that time Mary Wallace was present; that Mr. Wallace said, "Yes, offer the full commission. Maybe it will get a sale quicker. We want to sell that property and get the money out."

He further testified that he filed two bills for foreclosure of the property in question, and then prepared a decree of sale, and in the course of the proceedings, had Arens appointed receiver; that in the case in the Circuit Court there was a contest about Arens' accounts as receiver, and a reference to a Master, and a decree by the court confirming the Master's report, which made a surcharge against the receiver for money which he had received but not accounted for; that a similar situation arose in the case in the Superior Court, and that there was, also, in that case, a surcharge against the receiver for various amounts, for which he, as receiver, had failed to account.

The testimony of Odell was objected to by counsel for the defendant on the ground that he was attorney for Mrs. Wallace in the foreclosure proceedings; that the testimony sought, coming from him, would be a disclosure of confidential communications; that his testimony would be against his client who is dead; and that he was interested in the result of the suit, as he had given a bond for Arens as receiver.

who not only instituted the foreclosure proceedings for
Mrs. Williams, but obtained the assignment of the
property, that in the event of a sale of the property
it would be sold subject to the mortgage being owing to
himself. Mrs. Williams asked him to be paid
before the property was sold. He said that he would
do so, but he suggested to Mrs. Williams that he did
not think it was necessary to offer up the property
for sale. That he was then told that the property
was to be sold, after the full completion of the
it will get a sale order. He went to sell the property and
got the money out."

He further testified that he filed two bills for
foreclosure of the property in question, and then prepared
a notice of sale, and in the course of the proceedings, had
some appointed receiver; that in the case in the Circuit
Court there was a contest about the receiver, and a receiver
was appointed by the court, and a reference to a Master, and a decree by the court
confirming the Master's report, which was a summary against
the receiver for money which he had received but not accounted
for; that a similar situation arose in the case in the
Superior Court, and that there was, also, in that case, a
summary against the receiver for various amounts, for which
he, as receiver, had failed to account.

The testimony of O'Neil was objected to by counsel
for the defendant on the ground that he was attorney for
Mrs. Williams in the foreclosure proceedings; that the testi-
mony sought, coming from him, would be a disclosure of non-
identical communications; that his testimony would be against
his client who is dead; and that he was interested in the
result of the sale, as he had given a bond for him as receiver.

Counsel for the plaintiff, offered the testimony of one Meusel, who had acted as attorney for Arens, as receiver in the foreclosure cases in the Circuit and Superior Courts, and who was attorney for Mrs. Arens, as administratrix of her husband's estate. His testimony was objected to, and the objection sustained.

Evidence was introduced by the plaintiff that the usual, customary and reasonable rate for broker's commissions, in Chicago, is three per cent.

Evidence, also, was introduced that a claim was filed in the Estate of Mary W. Wallace, deceased, on August 14, 1924, by the Estate of John M. Arens, deceased, for \$1500.00; that Letters were taken out in the Estate of Mary W. Wallace, deceased, on March 14, 1923, and that adjudication was entered in that estate on May 7, 1923.

There was offered in evidence, on behalf of the defendant, an application for Letters of Administration in the Estate of John M. Arens, deceased, which was filed in the Probate Court of Cook County, on March 9, 1920, and signed by Clara B. Arens, widow of the deceased, in which, after setting forth the heirship, it stated the full value of the estate of the deceased to be not in excess of \$500.00. Its admission was objected to by counsel for the plaintiff, and the objection sustained.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court:-

The contract for the sale of the real estate was executed August 14, 1919, and if John M. Arens, was entitled to a commission, it was due on that date. He died December 29, 1919, but there is not a word of evidence that he at any time

The contract for the sale of the real estate was
 executed August 14, 1916, and it John M. Adams, was entitled
 to a commission, it was due on that date. He died December 22,
 1916, but there is not a word of evidence that he at any time
 of the contract.

The evidence in the case of the real estate was
 presented by the testimony of John M. Adams, deceased, which was filed
 in the estate of John M. Adams, deceased, which was filed
 in the probate court of Cook County, on March 14, 1917, and
 signed by John M. Adams, widow of the deceased, in which
 her setting forth the bequest, it stated the full value
 of the estate of the deceased to be not in excess of \$500.00.
 The admission was subject to by counsel for the plaintiff.
 and the defendant.

The evidence in the case of the real estate was
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 in the estate of John M. Adams, deceased, which was filed
 in the probate court of Cook County, on March 14, 1917, and
 signed by John M. Adams, widow of the deceased, in which
 her setting forth the bequest, it stated the full value
 of the estate of the deceased to be not in excess of \$500.00.
 The admission was subject to by counsel for the plaintiff.
 and the defendant.

made a claim for commission.

Mary J. Wallace who owned the real estate and from whom the commission is claimed, died January 25, 1923. Her will was probated February 16, 1923. An inventory was filed in her estate April 11, 1923. The plaintiff, administrator, made no claim against Mrs. Wallace's estate until August 14, 1924, exactly five years from the day the commission was due, in case Arens was entitled to any commission when the claim was made. At that time, the claim made was for \$1500.00. Mr. Wallace died January 30, 1925. The instant case was begun July 23, 1924, and the statement of claim alleged \$1500.00 as due, the same amount for which the claim was filed in the Probate Court. An amended statement of claim, however, was filed February 14, 1925, and, then, for the first time, the claim was made for \$2176.50. This occurred more than five years after the sale of the property, and there is not a word in the record as to why the claim was originally made for \$1500.00. Mrs. Arens filed her verified petition in the Probate Court of Cook County, asking that she be appointed administratrix of the estate of her deceased husband, John M. Arens. In that petition it appears that John W. Arens left no real estate and a personal estate not to exceed \$500.00. Apparently, neither Arens nor his wife had any idea that there were any commissions due. The trial judge excluded the petition. In our judgment, that was wrong. It was admissible as tending to show that the claim now made was an afterthought and first advanced after Arens died.

The testimony of Sinkus, who bought the property, is negligible. He testified that on the day the contract was signed, he was in Odell's office with Mr. and Mrs. Wallace and Arens and that these parties were in Odell's private office

was a claim for damages.

Only a limited time would be given for the claim.

Five years from the date of the claim, and January 15, 1935.

And will the Honorable Secretary of the Interior.

was filed in New York City April 11, 1935. The claimant.

Administrative, made no claim against the claimant's estate.

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Administrative, made no claim against the claimant's estate.

Administrative, made no claim against the claimant's estate.

The testimony of witness, who bought the property.

is significant. He testified that on the day the contract

was signed, he was in Ocala's office with Mr. and Mrs. Wilson.

and found that these parties were in Ocala's private office

and he was told to step outside, and go into the reception room, and that he did so; that that was done so he would not hear what was said between Odell, Arens and the Wallaces. But he testified the door was not fully closed and he overheard Mrs. Wallace say that she would take care of Arens in reference to paying him a commission. On the whole, his testimony is of little value.

Furthermore, it is very doubtful whether Arens could, in any view, be considered the "procuring cause" because, in reality, it was not sufficiently shown that he found Sinkus as a purchaser. Sinkus testified that he talked to one of the tenants of the property in question and asked her if it was for sale and who the owner was; that she told him to see the receiver Arens, and where he lived; that then he called up Arens in regard to the matter and afterwards they went down to Odell's office. Nor is Odell's testimony very satisfactory. He testified that he represented Mrs. Wallace in the foreclosure suit; that a number of conferences were held at his office between Mr. Wallace and Sinkus, Mrs. Wallace being present once, in reference to the sale of the property, and that on one occasion Mr. Wallace stated that he thought it advisable to offer Arens a full commission in case he obtained a purchaser for the property, and that Mrs. Wallace was present at the time. Odell's stenographer, Helen Smith, testified that she heard Mr. Wallace state in Odell's office that he would pay a commission to Arens if he sold the property. But she also testified that Mrs. Wallace was not there at the time. On the whole, the evidence on behalf of the plaintiff is very meager and unsatisfactory, and, of course, Mr. and Mrs. Wallace being dead at the time of the trial, there could be practically

and he was told to step outside, and go into the reception room, and that he did not; that that was done as he would not hear what was said between Odell, Lewis and the defendant, but he testified the door was not fully closed and he overheard Mrs. Wallace say that she would take care of them in reference to paying him a commission. At the whole, his testimony is of little value.

Furthermore, it is very doubtful whether there would be any view, he considered the "witnessing" process, in reality, it was not sufficiently shown that he found himself in a position to witness that he failed to see one of the tenants of the property in question and asked him if it was for sale and who the owner was; that she told him to see the receiver there, and where he lived; that there he called up there in regard to the matter and afterwards they went down to Odell's office. Now in Odell's testimony very contradictory. He testified that he represented Mrs. Wallace in the transactions with; that a number of conversations were held at his office between Mr. Wallace and himself, Mr. Wallace being present once, in reference to the sale of the property, and that on one occasion Mr. Wallace stated that he thought it advisable to offer Adams a full commission in case he obtained a purchaser for the property, and that Mrs. Wallace was present at the time. Odell's stenographer, Helen Smith, testified that she heard Mr. Wallace state in Odell's office that he would pay a commission to Adams if he sold the property. But she also testified that Mrs. Wallace was not there at the time. On the whole, the evidence on behalf of the plaintiff is very meager and unsatisfactory, and, of course, Mr. and Mrs. Wallace being dead at the time of the trial, there could be practically

none on behalf of the defendants.

As to the testimony of Odell, it was properly admitted. It was not a privileged communication between attorney and client. His testimony is to the effect that at some of the conferences in his office, Mr. and Mrs. Wallace and Arens were present and that at other times he was told by Mr. Wallace to see Arens and to offer him a commission in case he sold the property. And he further testified that he carried out this instruction.

Professional communications between attorney and client are privileged communications which the law on the ground of public policy excludes for the reason that greater mischief would result from permitting their admission than from rejecting them. If such communications were not excluded many would not dare to consult an attorney. The privilege is of the client and not of the attorney. People v. Marcofsky, 219 Ill. App. 230. It is also the law that a communication between attorney and client is generally not privileged when made in the presence of a third person who is not the agent of the attorney or client. Sec. 2311, Vol. 5, Wigmore on Evidence, 2nd Edition.

It is further contended that as Odell was surety on a bond given by Arens in the receivership proceedings, he, Odell, was interested in the Estate of Arens recovering in this suit for commissions, and that error was committed in permitting him to testify. Sec. 2, Chap. 51, Cahill's Rev. Stats., 1925, provides that "no party to any civil action * * *, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion or in his own behalf * * *

none on behalf of the defendant.

As to the testimony of Odell, it was properly

admitted. It was not a privileged communication between

attorney and client. His testimony is to the effect that at

one of the meetings in his office, Mr. and Mrs. Odell

and Arons were present and that at other times he was told

by Mr. Odell to see Arons and to offer him a commission in

case he sold the property. He further testified that he

arrived at this conclusion.

Professional communications between attorney and

client are privileged communications which the law on the

ground of public policy enforces for the reason that greater

effect would result from permitting their admission than

from rejecting them. If such communications were not excluded

many would not dare to consult an attorney. The privilege is

of the client and not of the attorney. People v. Katsky.

113 Ill. 2d 444. It is also the law that a communication

between attorney and client is generally not privileged when

made in the presence of a third person who is not the agent

of the attorney or client. See Will, Vol. 8, § 1000 on

Evidence, 2nd Edition.

It is further contended that as Odell was merely an

agent given by Arons in the receivership proceedings, he,

Odell, was interested in the estate of Arons recovering in

this suit for commissions, and that error was committed in

permitting him to testify. See 2d Supp. Ill. Ann. § 1000.

State, 1928, provides that "no party to any civil action"

or person directly interested in the event thereof, shall be allowed

to testify therein on his own motion or in his own behalf."

when any adverse party sues or defends * * * as the executor or administrator * * * of any deceased person, * * * unless then called as a witness by said adverse party so suing or defending," etc. The interest of a "person directly interested" must be a legal interest in the outcome of the suit, and an interest that is certain, direct and immediate. Ackman v. Potter, 239 Ill. 578; Flynn v.

Flynn, 283 Ill. 206; Holland v. Peoples Bank, 303 Ill. 381.

It has been said that the interest of such a witness must be direct, certain and vested. Bellman v. Epstein, 279 Ill.

34. It is stated that if the interest is of a doubtful nature, it goes to the credibility of the witness, and not to his competency. Stephens v. Hoffman, 263 Ill. 197. An examination of the cases in which Section 2 has been discussed, as it pertains to the phrase "person directly interested," shows that even though Odell was on a bond for Arens, he, Odell, did not have such an interest in this suit as to disqualify him as a witness. Further, the record in this case would not be introduced in evidence in an action against Odell on the appeal bond. Psittl v. Chicago City Ry. Co. 211 Ill. 279. In that case the court in discussing the question whether a witness was "directly interested in the event" within the meaning of Sec. 2 Chap. 52 of our statute, said (p. 286) "A test of such interest is whether he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action." In the instant case, Odell would

-11-

neither gain nor lose by the effect of the judgment entered.

For the reasons stated, the judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

O'CONNOR AND THOMSON, JJ. CONCUR.

Further, the use of the word "and" in the second sentence of the paragraph is significant.

• **Local Area Network (LAN)**

As this morning, all, please attend all in

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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151 - 31281

PETER SARELAS,

Appellee,

v.

GENE GOLDMAN,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Monday, June 13, 1937.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On June 23, 1923, the plaintiff, Peter Sarelas, a licensed real estate broker, entered into a written contract, under seal, with the North Side Realty Co., by which he was employed to sell real estate and to receive as compensation for his services an amount equal to five per cent of the selling price of "all sales consummated directly by and through" his efforts.

On September 14, 1923, a written agreement for the sale of four lots for \$13,500.00, was made between the "North Side Realty Trust Number 3" as vendor, and Thomas Levantis, Peter L. Poulos and Constantine A. Sutter, as vendees, and payments were made thereon according to its terms.

On January 15, 1924, the plaintiff, claiming that he sold the property, brought suit in the Circuit Court against J. E. Bolotin and Gene Goldman, doing business as the North Side Realty Co., for \$675.00, being five per cent on the purchase price of \$13,500.00. There was a trial before the court, with a jury, and a verdict and judgment

Case 1:14-616

101 - 1101

Peter L. Taylor

Appellee

Appellant

James H. Taylor

Appellant

James H. Taylor

Appellee

Opinion filed Monday, June 13, 1987.

MR. PRESIDING JUSTICE TAYLOR delivered the

opinion of the court.

On June 22, 1985, the plaintiff, Peter Taylor,

a licensed real estate broker, entered into a written

contract, under which, with the North Side Realty Co.,

by which he was employed as a sales agent, he

received as compensation for his services an amount

equal to five per cent of the selling price of all

sales consummated directly by and through his efforts.

On September 14, 1985, a written agreement for

the sale of four lots for \$12,500.00, was made between the

"North Side Realty Trust Number 2" as vendor, and Thomas

Levanitis, Peter L. Taylor and Constantine A. Taylor, as

vendee, and payments were made thereon according to the

terms.

On January 18, 1986, the plaintiff, claiming

that he sold the property, brought suit in the Circuit

court against L. A. Levanitis and Peter Taylor, being vendee

as the North Side Realty Co., for \$750.00, being five per

cent on the purchase price of \$12,500.00. There was a

trial before the court, also a jury, and a verdict and judgment

for the plaintiff, against the defendant, Gene Goldman, in the sum of \$675.00. This appeal is therefrom.

The two defendants, J. E. Bolotin and Gene Goldman, were both served with summons, and their appearances entered. The written contract of employment of the plaintiff was signed as follows: "North Side Realty Company (Seal), Gene Goldman (Seal), J. E. Bolotin, Sales Mgr. (Seal), Peter Sarelus (Seal)."

The evidence shows, substantially, the following:-

On June 23, 1923, the plaintiff, a licensed real estate broker, went to work under the written contract above referred to, which was signed, "North Side Realty Co., Gene Goldman (SEAL)." At the time in question, the Company was selling what was called the Elston Subdivision. The company had, according to the testimony of the defendant, Gene Goldman, from 5 to 20 sales managers whose duty it was to hire salesmen to sell real estate; that at times the company had as many as 20, and sometimes 100, salesmen, all of whom were hired under contracts similar to the one above mentioned; that she signed sometimes 16 or 20 at a time. The subdivision in question was owned by the North Side Realty Company, and the salesmen, or agents, sold on a commission basis, which commission was paid by the company.

It is the evidence of the plaintiff that he showed the lots in this subdivision to many prospects, and among them one Leventis; that Gene Goldman asked him to go and see Leventis, and told him, the witness, that Leventis had seen the property some months ago, but that the company was

for the plaintiff, against the defendant, Gene Goldstein, in
the sum of \$100,000. This amount is liquidated.

The two defendants, A. B. Goldstein and Gene Goldstein,
were both served with summons, and their answers were filed.
The answer of defendant of defendant of the plaintiff was
signed as follows: "North Atlantic Realty Company (Genl.), Gene
Goldstein (Genl.), A. B. Goldstein, Sales Rep. (Genl.), Peter
Goldstein (Genl.)."

The evidence shows, substantially, the following:-
On June 28, 1935, the plaintiff, a licensed real
estate broker, went to work under the witness defendant above
referred to, which was signed, "North Atlantic Realty Co., Gene
Goldstein (Genl.)." At the time in question, the company was
selling what was called the "Lionel Lincoln Building." The witness
had, according to the testimony of the defendant, Gene Goldstein,
from 5 to 20 sales men at the time that it was to give witness
a full year's salary; that at times the company had as many as
30, and sometimes 100, salesmen, all of whom were hired under
contracts similar to the one above mentioned; that the sales
sometimes 10 or 20 at a time. The subdivision in question
was owned by the North Atlantic Realty Company, and the witness,
or agents, sold on a commission basis, which commission was
paid by the company.

It is the evidence of the plaintiff that he showed
the lots in this subdivision to many prospectors, and among
them was defendant; that Gene Goldstein asked him to go and
see the lots, and told him, the witness, that prospectors had
also been prospecting some months ago, but that the company was

unable to close the deal, or do anything with it; that she asked him, the plaintiff, to go and see Leventis right away; that he then, in the presence of Gene Goldman, called up Leventis, and made an appointment with him; that later, he went and saw Leventis, showed him a map of the property, talked to him about the property, and Leventis told him he would give him his answer the next Monday; that that was sometime about the first week in September, 1923; that he saw Leventis twice and was with him one-half to three-quarters of an hour each time; that he did not take Leventis out to see the property; that it was on Saturday that Leventis told him he would give him a definite answer on Monday; that he went to see Leventis on Monday, and Leventis told him that he had bought a place on North Avenue and 56th street with his cousins; that if he decided to buy the property in question, which he, the plaintiff, had spoken of, he, Leventis, would buy it from him; that later, in the office of the defendant, he saw a contract whereby Leventis had bought the property in question for \$13,500.00; that "Leventis told me he didn't pay that much, he paid less, figuring on deducting the commissions that I should get, and Mr. Leventis said I was a poor salesman because I didn't offer him part of my commissions in order to close the deal."

On Objection for the defendant, the court struck out the statement just quoted.

The plaintiff further testified that after he found the sales contract, he asked Miss Goldman and Mr. Goldman for his commissions; that his commissions were \$675.00.

unable to close the deal, or to anything with it; that she asked him, the plaintiff, to go and see Lavenia right away; that he then, in the presence of Gene Goldman, called up Lavenia, and made an appointment with him; that later, he went and saw Lavenia, showed him a map of the property, failed to tell him about the property, and Lavenia told him he would give him his answer the next Monday; that that was something about the first week in November, 1933; that he saw Lavenia twice and was with him one-half to three quarters of an hour each time; that he did not take Lavenia out to see the property; that it was on Saturday that Lavenia told him he would give him a definite answer on Monday; that he went to see Lavenia on Monday, and Lavenia told him that he had bought a place on North Avenue and 58th Street with his domain; that if he decided to buy the property in question, which he, the plaintiff, had spoken of, he, Lavenia, would pay it from that later, in the office of the defendant, he saw a contract whereby Lavenia had bought the property in question for \$15,000.00; that Lavenia told me he didn't pay that much, he paid less, figuring on deducting the commission that I should get, and Mr. Lavenia said I was a poor fellow because I didn't offer him part of my commission in order to close the deal."

On objection for the defendant, the court struck

out the statement just quoted,

The plaintiff further testified that after he found the sales contract, he asked Miss Goldman and Mr. Goldman for his commission; that his commissions were \$275.00.

On cross-examination, the plaintiff testified that he talked with Miss Goldman and Bolotin about Leventis as a prospective purchaser; that he asked Miss Goldman why Leventis did not buy, and she said she did not know; that he said he was going to consult his brother-in-law; and that she told him to go and see Leventis and get him to buy the property; that he telephoned to Leventis, made an appointment, and then he went out and talked to him about the property, and quoted to him the price; that Leventis told him to come back on Monday; that he, the plaintiff, asked him to make an offer, subject to the approval of the firm; that Leventis told him that on Monday he would let him know definitely whether he would buy or not; that he saw Leventis on Monday, and asked him what was his decision; that Leventis said, "Nothing; I buy away out at North Avenue and 56th street; with my cousins;" that at the close of their talk, Leventis said, "In case I would decide to buy this particular property I would call you;" that he, the plaintiff, then went back to the office of the defendant, and there saw the contract with Leventis' name on it for the purchase of the property in question, for \$13,500.00; that he talked to Miss and Mr. Goldman, and they "told me that they would pay me;" that a few days later, he talked to Gene Goldman, and said to her, "Remember when I told you last Saturday that he would decide and give me his decision Monday morning?" that she said, "Yes;" that he then said, "Evidently you must have closed the deal with him, because this morning he told me he didn't buy that, he bought on 56th and North avenue with his cousins;" that Gene Goldman then said, "Don't say anything, I will pay you;" that Mr. Goldman

On cross-examination, the plaintiff testified that he talked with Miss Goldstein and Goldstein about Laventis as a prospective purchaser; that he asked Miss Goldstein why Laventis did not buy, and she said she did not know; that he said he was going to consult his brother-in-law; and that she told him to go and see Laventis and get him to buy the property; that he telephoned to Laventis, made an appointment, and when he went out and talked to him about the property, she wanted to see him; that Laventis told him to come back on Monday; that he, the plaintiff, asked him to make an offer, subject to the approval of the firm; that Laventis told him that on Monday he would let him know definitely whether he would buy or not; that he saw Laventis on Monday, and asked him what was his decision; that Laventis said, "Nothing; I buy away out of North Avenue and 22nd Street; with my consent;" that at the close of their talk, Laventis said, "In case I would decide to buy this particular property I would call you;" that he, the plaintiff, then went back to the office of the defendant, and there saw the contract with Laventis' name on it for the purchase of the property in question, for \$12,500.00; that he talked to Miss and Mr. Goldstein, and they told him that they would buy it; that a few days later, he talked to Gene Goldstein, and said to him, "Remember when I told you last Saturday that he would decide and give me his decision Monday morning?" that she said, "Yes;" that he then said, "Evidently you must have closed the deal with him, because this morning he told me he didn't buy that; he bought on 22nd and North Avenue with his 'consent';" that Gene Goldstein then said, "Don't get anything, I will pay you;" that Mr. Goldstein

said the same thing; that two days later, because they did not pay him out of the 30% that was paid down on the lots, he quit.

In rebuttal, the plaintiff testified that when he saw Leventis, after telephoning to him, it was at Leventis' restaurant; that he and Leventis sat at the table in the restaurant and discussed the matter about three-quarters of an hour; that he and Leventis both talked in Greek, which language they spoke fluently; that they talked of nothing but the property in question; that he told Leventis that Gene Goldman had told him that the price was going up and to advise him to buy, and act quickly; that it was on that occasion that Leventis told him to come back on Monday; that in their conversation on Monday, Leventis thanked him and told him in case he bought the lots in question, he would buy them from him, the plaintiff; that when he went back to the office on Saturday, he told Gene Goldman that Leventis was interested and would give him a definite answer Monday morning.

Leventis, who, together with two others, bought the property in question, was called by the plaintiff, and testified that the plaintiff came to his place of business, and he saw him at once, and that he had no telephone conversation with him previous to that. On cross-examination, he testified that the plaintiff came to his store and told him he was a real estate salesman; that that was the latter part of August, or the early part of September; that he told the plaintiff he already knew about the property; that he might drop in some other time, and if he, the witness,

said the same thing that two days later, because they did not pay him out of the \$25, that was paid down on the job, he quit.

In substance, the plaintiff testified that when he saw Levantis, when he was in the office, it was at Levantis' request; that he saw Levantis and he was in the office; Levantis and discussed the matter about three-quarters of an hour; that he and Levantis both talked in French, which language they spoke fluently; that they talked of nothing but the property in question; that he told Levantis that Gene Goldman had told him that the price was going up and convincing him to buy, and not delay; that it was on that occasion that Levantis told him to come back on Monday; that in their conversation on Monday, Levantis showed him and told him in case he bought the job in question, he would pay them from him, the plaintiff; that when he went back to the office on Monday, he told Gene Goldman that Levantis was interested and would give him a definite answer Monday morning.

Levantis, who, together with two others, bought the property in question, was called by the plaintiff, and testified that the plaintiff came to his place of business, and he saw him at once, and that he had no telephone conversation with him previous to that. On cross-examination, he testified that the plaintiff came to his store and told him he was a real estate salesman; that that was the last part of August, or the early part of September; that he told the plaintiff he already knew about the property; that he might drop in some other time, and if he, the witness,

decided to buy, he would let him know; that that was the only time he talked with the plaintiff before he closed the deal; that the plaintiff came to see him several times after the property was sold. On re-direct examination, he testified that he told the plaintiff that he knew about the property, and if he could get the persons he always bought real estate with, perhaps he would buy it, otherwise he would not be interested; that he bought the property two or three days later; that he talked to the plaintiff about the property, and saw Gene Goldman several times between the first time he saw it and the time he purchased it. On re-cross examination, he testified that he bought the property with two other men, his interest being one-third.

On behalf of the defendant, her testimony and that of Bolotin, a sales manager for the North Side Realty Company was introduced. It is the evidence of the defendant that she did not recall that she ever talked to the plaintiff before the time the contract in question for the sale of the lots to Leventis, and others, was signed; that she did not see him in the latter part of August, or the early part of September, nor ask him to see Leventis about the purchase of the lots, nor talk with him, at any time prior to the time the contract was signed, about them; that she did not tell him that she had shown the property to Leventis; that she never discussed the matter with him at all; that one, Salekson, brought Leventis to her as a prospect; that Salekson was a salesman in the employment of the North Side Realty Company; that she, herself, sold the property to the three men whose names appear on the contract. On cross-

desired to buy, he would let him know that was the only
time he talked with the plaintiff before he signed the contract;
that the plaintiff came to see him several times after the
property was sold. On re-direct examination, he testified
that he told the plaintiff that he knew about the property,
and if he would get the purchase he always bought real estate
with, perhaps he would buy it. He testified he would not be in-
terested; that he bought the property two or three days
later; that he talked to the plaintiff about the property,
and saw some of the same several times between the first time
he saw it and the time he purchased it. On re-cross examina-
tion, he testified that he bought the property with two other
men, his interest being one-third.

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of the witness, a sales manager for the North Side Realty Company
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the time the contract in question for the sale of the land
to Laventis, and others, was signed; that she did not see
him in the latter part of August, or the early part of
September, nor ask him to see Laventis about the purchase
of the land, nor talk with him, at any time prior to the
time the contract was signed, about them; that she did not
tell him that she had shown the property to Laventis; that
she never discussed the matter with him at all; that one,
Helen, brought Laventis to her as a prospect; that
Helen was an employee of the North Side
Realty Company; that she, herself, sold the property to the
three men whose names appear on the contract. On cross-

examination, she testified that the partnership is composed of William Goldman, Louis Goldman and herself, Gene Goldman; that she did not talk to the plaintiff about Leventis, nor tell him that she had shown the property to Leventis, nor urged him to go out and see Leventis; that commissions on the sale in question were paid to Salekson; that she had no personal conversation with the plaintiff at all after the deal was consummated, and never talked to him about that property, or any other.

From the foregoing evidence, it is obvious that the question whether the services of the plaintiff, as sales agent for the North Side Realty Company, led to the consummation of the sale in question, depends upon the credence to be given to the various witnesses. Salekron for some reason was not called. The evidence of the plaintiff, taken by itself, makes out a cause of action, and, considering the verdict evidently was believed by the jury, and in such a case as this, that is a fact of considerable import, because unless the record here shows inconsistencies and discrepancies, which cast serious doubt upon the credibility of the plaintiff, we would not be justified in overriding the verdict as being against the manifest weight of the evidence. The evidence shows that the North Side Realty Company had a set of sales managers, and that under them there were a large number of real estate salesmen, each of whom, presumably, was at work undertaking to get purchasers for the various lots in the subdivision in question. The plaintiff was one of those salesmen. According to his testimony, he got certain information from the main office, then undertook

or any other.
communicated, and never talked to him about that property.
consequently with the plaintiff at all after the day we
in question were paid to defendant; that she had no personal
him to go out and see defendant; that communications on the case
him that she had shown the property to defendant, nor urged
that she did not talk to the plaintiff about defendant, nor tell
of William Graham, Lewis Graham and herself, and defendant;
exhibited, and testified that the defendant is a married

not certain information from the main office, then understood
was one of these witnesses, according to his testimony, he
various facts in the subdivision in question. The plaintiff
immediately, was at work undertaking to get permission for the
large number of coal waste culm, each of whom, pro-
not of sales witnesses, and that under their terms were a
The evidence shows that the North Side Realty Company had a
the verdict as being against the plaintiff's weight of the evidence,
ity of the plaintiff, we would not be justified in overrid-
and discrepancies, which cast serious doubt upon the credibil-
largest, because unless the court was to be convinced
and in fact a mere as to, that is a fact of considerable
conceding the verdict's validity was believed by the jury.
sift, taken by itself, makes out a case of action, and
for some reason was not called. The evidence of the plain-
the evidence to be given in the various witnesses. Defendant
the commission of the sale in question, depends upon
an sales agent for the North Side Realty Company, led to
that the question whether the services of the plaintiff,
The following evidence, it is submitted

to get Leventis to purchase the property in question, with the result that Leventis and two of his friends bought the property. That he got Leventis to buy the property is denied by the testimony of the defendant and others. That being the situation, we do not feel justified in overriding the verdict of the jury.

It is contended that the judgment cannot stand, on the ground that there was a non-joinder of defendants. The written contract of employment of the plaintiff is, on its face, somewhat confusing, inasmuch as it first recites that it was made between "J. E. Bolotin, for North Side Realty Company, party of the first part", and the plaintiff, and it is signed, "North Side Realty Co., Gene Goldman (Seal), J. E. Bolotin, Sales Mgr. (Seal) Peter Sarelson (Seal)". In our judgment, with the contract in that condition, and the pleadings as they are, the plaintiff was entitled to sue as he did, "J. E. Bolotin and Gene Goldman, doing business as the North Side Realty Company," and then, before verdict and judgment, dismiss as to J. E. Bolotin, and have judgment entered against Gene Goldman.

Gene Goldman was served and pleaded to the declaration, but filed no plea in abatement, on the ground of non-joinder. She must have known who her partners were when she was sued, and it was her duty to object to their not being joined with her as early as possible by way of plea. In Sinshelmer v. Skinner, Mfg. Co., 165 Ill. 116, 121, the court said, "The rule is a familiar one that in actions ex contractu all parties jointly liable should be joined as defendants. But if a party who should have been joined is omitted it is

to put Loretta on notice the property is mortgaged, with the result that Loretta was not of his friends sought the property. That he put Loretta on notice the property is mortgaged by the testimony of the statement and others. That being the situation, we do not feel justified in overruling the verdict of the jury.

It is suggested that the judgment cannot stand, on the ground that there was a non-joinder of defendants. The written contract of employment of the plaintiff is on its face, somewhat confusing, inasmuch as it twice recites that it was made between "J. E. Holstein, for North Side Realty Company, party of the first part," and the plaintiff, and it is signed, "North Side Realty Co., Gene Goldman (Decl.), J. E. Holstein, Sales Rep. (Decl.) Peter Savelle (Decl.)". In our judgment, with the contract in that condition, and the pleadings as they are, the claimant was entitled to sue as he did, "J. E. Holstein and Gene Goldman, doing business as the North Side Realty Company," and then, before verdict and judgment, disclaim as to J. E. Holstein, and have judgment entered against Gene Goldman.

Gene Goldman was served and pleaded to the declaration, but filed no plea in response, on the ground of non-joinder. One must have known who her partners were when she was sued, and it was her duty to object to their not being joined with her as early as possible by way of plea. In Richards v. Richards, 121, 122, 123, 124, the court said, "The rule is a familiar one that in actions ex contractu all parties jointly liable should be joined as defendants. But if a party who should have been joined is omitted it is

well settled that the other defendants can take advantage of the non-joinder only by plea in abatement." Doing business, as the evidence shows the defendant did, and using a name which purported to be the name of a corporation, it looks very much as though some effort was made to conceal the names of those who constituted the, so-called, North Side Realty Company. Further, it appears, from a colloquy which took place between the court, counsel representing the plaintiff, and counsel for Gene Goldman (out of the presence of the jury), that the matter of non-joinder was discussed, and it was finally agreed between counsel and the court that if there was any judgment, it should go against Gene Goldman, doing business as the North Side Realty Company.

It is further contended for the defendant, that error was committed in regard to evidence pertaining to an alleged settlement. When the plaintiff was being examined by his counsel, he was asked how long he continued in the service of the company, and he ended his answer by saying, "They offered me only \$100.00, and which I refused." Counsel for the defendant objected, and asked that the answer be stricken out. The court then said, "It is absolutely improper * * * it will be stricken out and the jury instructed to disregard the statement."

When the plaintiff was asked by his counsel, "When you requested your commission, did they make you an offer of settlement?" to which he answered, "They did," counsel for the defendant objected, and the court then said, "Sustained. Any offer is incompetent." Counsel for the plaintiff then

well settled that the other defendant can take advantage of the non-joinder only by plea in abatement." Being put-
then, as the evidence shows the defendant did, and being
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Side Realty Company. Further, it appears, from a colloquy
which took place between the court, counsel representing
the plaintiff, and counsel for the defendant (out of the pres-
ence of the jury), that the matter of non-joinder was dis-
missed, and it was finally agreed between counsel and the
court that it was not judgment, it was a ruling.
That defendant, being defendant on the North Side Realty

Company.
It is further contended for the defendant, that
error was committed in regard to evidence pertaining to an
alleged settlement. When the plaintiff was being examined
by his counsel, he was asked how long he continued in the
service of the company, and he asked his counsel by saying,
"They offered me only \$100.00, and said I refused." Counsel
for the defendant objected, and asked that the answer be
stricken out. The court then said, "It is absolutely improper
for it will be stricken out and the jury instructed to
disregard the statement."

When the plaintiff was asked by his counsel, "When
you requested your commission, did they make you an offer of
retainer?" to which he answered, "They didn't" counsel for
the defendant objected, and the court then said, "Sustained."
My offer is immaterial." Counsel for the plaintiff then

offered evidence showing that subsequent to plaintiff's request for compensation as commissions, the defendants made him an offer of \$100.00 for his services. The court then said, "It will be refused. The jury are instructed to disregard any such offer, or any testimony of such offer."

The law as to the competency of such evidence is discussed at large in Wigmore on Evidence, Section 1048. In our opinion, the evidence was properly rejected and the jury rightly instructed to disregard what the plaintiff had said on that subject. But, notwithstanding the incompetency of the testimony, considering the instructions given by the court to the jury, we do not feel that we are justified in holding that what took place on that subject constitutes sufficient error to justify a reversal of the judgment.

For the reasons stated, the judgment will be affirmed.

AFFIRMED.

O'CONNOR AND THOMSON, JJ. CONCUR.

offered evidence showing that defendant is guilty of the crime charged. The court requested for consideration on remission, the testimony of the witness who testified that he saw the defendant on the night of the crime. The court then said, "It will be returned. The jury are instructed to disregard any such offer, or the testimony of such witness." The court then said, "The law is that the testimony of such witness is inadmissible as being in violation of the rules of evidence. It is not admissible. The witness was properly rejected and the jury rightly instructed to disregard such testimony. The defendant is not guilty. But, notwithstanding the instructions given by the court to the jury, we do not feel that we are justified in holding that such case on that subject constitutes sufficient error to justify a reversal of the judgment. For the reasons stated, the judgment will be affirmed."

Affirmed.

WITNESSES:

JOHN W. AND THOMAS, JR. BOWEN.

235 - 31357

PHILIP A. COPENHAVER,

Appellee,

v.

INGSTRUP BURKE, INC.,

Appellant.)

245 P.A. 616¹⁷

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Monday, June 13, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On November 5, 1924, the plaintiff, Philip A. Copenhaver, brought suit in the Municipal Court against the defendant, Ingstrup Burke, Inc., to recover damages for the non-performance of an alleged contract under which the defendant was to do certain work on a building being constructed by the plaintiff. There was a trial before the court, with a jury, and a verdict and judgment in favor of the plaintiff in the sum of \$800.00. This appeal is therefrom.

In the statement of claim, the plaintiff alleged "that he entered into a written contract with the defendant for painting and decorating his building; that the defendant breached and refused to carry out said contract, after being duly and legally notified to proceed to the damage of this plaintiff of Eight Hundred (\$800.00) Dollars, plaintiff being obliged to pay Six Hundred (\$600.00) Dollars more than the contract to other contractors to do the same work as the defendant agreed to do, and Two Hundred (\$200.00) Dollars damages on account of the delay caused by the breach and refusal of the defendant to carry out its contract."

205 - 31387

WILLIAM A. BENTLEY

WILLIAM BENTLEY, INC.

Opinion filed Monday, June 18, 1937.

MR. BENTLEY'S MOTION FOR A WRIT OF HABEAS CORPUS

On November 3, 1936, the Plaintiff, William A.

Goppenheimer, brought suit in the Municipal Court against

the defendant, William Bentley, Inc., to recover damages

for the non-performance of an alleged contract under

which the defendant was to do certain work on a building

being reconstructed by the plaintiff. There was a

trial before the court, with a jury, and a verdict and

judgment in favor of the plaintiff in the sum of \$200.00.

This appeal is brought.

In the statement of claim, the plaintiff alleged

"that he entered into a written contract with the defendant

and for painting and decorating his building that the defendant

breached and refused to carry out said contract,

after being duly and legally notified to proceed to the

205 - 31387

The defendant filed an affidavit of merits, in which it denied that it was indebted to the plaintiff in any sum; and in which it was alleged that it "did not by any one duly authorized by it, enter into a contract with plaintiff to decorate plaintiff's building, as alleged in plaintiff's statement."

It is the theory of the plaintiff that, on April 1, 1934, he entered into a written agreement with the defendant, whereby the defendant, as contractor, agreed for the sum of \$1,090.00, "to provide all materials and perform all the work for the entire erection and completion of all painting and paper hanging, in a three (3) story brick apartment building * * ", including each and every item, as described in the specifications, and shown on drawings prepared by Duckworth Brothers * * *, Architects, and to do, to the satisfaction of the architect, everything required by him by the general conditions, specifications and drawings. * * " and whereby the defendant agreed to complete the work as soon as the building was ready to receive the painting and paperhanging, and "to pay, or allow the owner, as liquidated damage, the sum of Five Dollars (\$5.00) for each day thereafter, Sundays and legal holidays not included, that the work remains uncompleted;" that the defendant failed and refused to do any of the work, and that as a result, the plaintiff had to pay to have the work done, \$600.00 more than the original contract price, and that by reason of the delay, he was entitled also to recover \$200.00, being \$5.00 a day for forty days.

On the other hand, it is the theory of the defend-

The defendant filed an affidavit of service, in which it is stated that it was furnished to the plaintiff in any way; and in which it was alleged that it did not by any one duly authorized by it, enter into a contract with plaintiff to execute plaintiff's building, as alleged in plaintiff's statement.

It is the theory of the plaintiff that, on April 1, 1904, he entered into a written agreement with the defendant, whereby the defendant, as contractor, agreed to perform all the work for the entire structure and completion of all painting and paper hanging in a three (3) story brick apartment building "A", including work and every item, as mentioned in the specification, and as more fully described by defendant's Exhibit "A", including and to be in the completion of the building, including the work of the general contractor, plumbing and heating, "B" and whereby the defendant agreed to complete the work as soon as the building was ready to receive the painting and paperhanging, and to pay, or allow the owner, as liquidated damage, the sum of five dollars (\$5.00) for each day thereafter, Sunday and legal holidays not included, that the work remains uncompleted; that the defendant failed and refused to do any of the work, and that as a result, the plaintiff had to pay to have the work done, \$500.00 more than the original contract price, and that by reason of the delay, he was entitled also to recover \$500.00 being \$5.00 a day for forty days.

On the other hand, it is the theory of the defendant

ant, that although the contract in question was signed by one Weidner, who was in the employment of the defendant, and who solicited contracts for the defendant, it was signed by him without authority, and so did not bind the defendant; that the delay is not chargeable against the defendant, and that certain evidence which was offered on the subject of damages was incompetent.

(1) As to whether a binding contract was made between the parties. The defendant Ingstrup Buhrke, Inc., is a corporation, of which Walter Ingstrup is president. In the spring of 1934, Duckworth Brothers, architects, who were employed as superintendents and architects for the plaintiff concerning the building of a three story apartment building, drew certain plans and specifications, and had different contractors figure on them.

Some time in March, 1934, one Weidner, who was a drapery man and interior decorator, and employed by the defendant, presented to Ingstrup, president of the defendant company, certain plans and asked him to figure on them. Weidner stated that he got the plans and specifications, and took them to Ingstrup, and showed them to him, and that Ingstrup went over them and figured out a price; that he, Weidner, in the presence of Ingstrup, gave the figures to the stenographer to write out on the typewriter.

There was offered in evidence a letter of March 28, 1934, signed by "Ingstrup Buhrke Co., By Emil L. E. Weidner," and addressed to Duckworth Bros., Architects, (referring expressly to the three story apartment building

of the plaintiff) as follows:

"We hereby agree to furnish all labor and materials necessary to execute the painting, decorating, and wood finishing in the above mentioned building, all work to be carried out in accordance with the plans and specifications, for a consideration of One Thousand Ninety Dollars (\$1090.00).

Trusting that the above will receive your favorable consideration," etc.

Weidner further testified that he was called by the defendant and went to the office and that Buhrke, the treasurer, told him that he had received a telegram from Duckworth Brothers, the architect, to go to their office to sign a contract for the building; that Buhrke told him to go down there and sign a contract, which he did; that he then went back to the defendant's office and told Buhrke that he had signed the contract, and gave Buhrke a copy of it.

It is the evidence of Duckworth, the superintendent and one of the architects for the plaintiff, that he drew the plans and specifications to construct the building, and then had different contractors figure on them; that on May 7, 1934, he received a letter from the defendant, requesting that Duckworth Bros. send specifications for the work to it; that on May 7, 1934, he sent by mail a copy of the specifications to the defendant, together with a letter stating that he was enclosing them pursuant to the defendant's request in its letter of May 9, 1934; that the contract was awarded to the defendant company, which had made the lowest bid, the contract being signed by Weidner, in his presence, for the defendant company. The contract is signed as follows: "Ingstrup

Buhrke Co., Per Emil W. Weidner, R. A. Copenhagen," with a seal opposite the words, "Ingstrup Buhrke Co."

On June 11, 1924, Duckworth Bros., architects, sent a letter to the defendant asking that company to make arrangements to start work on the painting contract, on the building in question, at once. On July 2, 1924, they sent another letter to the defendant, stating that they had been waiting for over three weeks for the defendant to begin work, and notifying the defendant that, under paragraph 40 of the General Conditions of the specifications, unless work was begun within 48 hours, that they, Duckworth Bros., would be obliged to award the contract to some other painter and charge the difference between the new contract and the defendant's contract to the defendant.

Duckworth further testified that about 40 days after he first notified the defendant to proceed with the work, he gave the contract to one Brennan, with the same specifications; drawn by them the same architects, and that Brennan did the work and was paid \$1690.00 on his contract. He further testified that between June 6 and 11, he telephoned the defendant company and talked with some man there in regard to sending men to the building to do the work; that the man with whom he talked on the telephone said he would send men out in a few days; that he asked the man to whom he telephoned at the defendant company's place, to get men on the job to paint and prime the sash; that the man to whom he spoke said he would send them out in a few days; that he called the defendant on three or four different occasions; that all that was said by the one to whom he telephoned, was that he would get men out in a few days;

and charge the difference between the new contract and the
old contract to the contractor. The contractor is to be
responsible for the difference between the new contract and the
old contract. The contractor is to be responsible for the
difference between the new contract and the old contract.

... testimony further testified that about 4:30 p.m. after he first notified the defendant to proceed with the work, he gave the contract to one Brennan, with the same specifications; drawn by them the same specifications, and that Brennan did the work and was paid \$1500.00 on his completion. He further testified that between June 8 and 11, he telephoned the defendant company and talked with some man there in regard to sending men to the building as to the work; that the man with whom he talked on the telephone said he would send men out in a few days; that he called the man to whom he telephoned at the defendant company's place, to get men on the job to paint and prime the work; that the man to whom he spoke said he would send them out in a few days; that he called the defendant on three or four different occasions; that all that time said to the man to whom he telephoned, that he would get men out in a few days;

that when he called up the defendant on the telephone he asked for the man who had charge of the Copenhagen job at the place in question, and that then he would be referred to the one who had charge of it.

The evidence for the defendant consists, chiefly, of the testimony of Ingstrup, the president. He testified that Weidner was in the defendant's employment in the early part of 1934, that Weidner asked about a figure on a three story building, and presented certain plans, but that he presented no specifications; that he, Ingstrup, about March 28, figured on the plans without specifications; that he never saw the letter dated March 28, which was addressed to Duckworth Bros., until it was shown to him at the trial; that in June, Duckworth Bros. asked him about sending men on the job, and he told them he knew nothing about the contract; that one of the Duckworth Bros. said that the contract had been awarded to the defendant company, and asked to have men sent out to do the work; that he, Ingstrup, said he would have to look up the contract first and see what it was; that Duckworth, about five or six days later, called up again about sending men on the job; that meanwhile he, Ingstrup, had looked up the contract; that he then told Duckworth that the defendant could not do the work, as they had not signed the contract; that when they had given the figure, they did not have any specifications to figure on; that the first he knew that Weidner had signed the contract was after the time when Duckworth called up about sending men on the job. He further testified that the figure of \$1000.00 in the contract in question, was not a fair and reasonable estimate for the work. On cross-examination,

that when he called up the witness in the witness box
called for the man who had charge of the telephone job at the
place in question, and that then he would be referred to the
one who had charge of it.

The witness for the defendant testified, briefly,
of the testimony of testimony, the president, as testified
that Webster was in the defendant's employment in the early
part of 1906, that Webster acted about a figure on a given
every building, and presented certain plans, and that he
presented a proposition; that he, Webster, about 1906
SA, looked at the plans without question; that he
never saw the letter dated June 22, which was addressed to
Buckworth Bros., until it was shown to him at the trial;
that in June, Buckworth Bros. asked him about sending men
on the job, and he told them he was willing to do so and
that; that one of the Buckworth Bros. said that the man
they had been awarded to the defendant company, and asked
to have men sent out to do the work; that he, Webster, said
he would have to look up the contract first and see what it
was; that Buckworth, about five or six days later, called
up again about sending men on the job; that meanwhile he,
Webster, had looked up the contract; that he then told
Buckworth that the defendant would not do the work, and
they had not signed the contract; that when they had given the
figure, they did not have any questions to figure on;
that the first he knew that Webster had signed the contract
was after he had been Buckworth called up about sending
men on the job. He further testified that the figure of
\$1000.00 in the contract in question, was not a fair and
reasonable estimate for the work, he estimated

he testified that he did not have the figures that were made up in March, when, he said, he made some figures that were not based on the specifications, but he did have a copy of the contract in his files. As to the letter which was sent by the defendant company on May 7 to Duckworth Bros., architects, requesting them to "send us specifications for the painting of the Copenhagen Building," he testified that he did not know whether that was done at his instruction. He further testified that when Weidner brought in the plans for the job, he gave him a temporary figure that was to stand until he got the specifications, which he did not have at that time.

Buhrke, the treasurer of the defendant company, testified that he never had any talk with Weidner about the Copenhagen property, and did not direct him to go to Duckworth's office and sign the contract. On cross-examination, he testified that he might have seen the proposal, or a copy of it, but that he did not believe he ever saw the plans and specifications.

It is admitted by the defendant that Weidner was in his employment, and that he solicited contracts, but it is contended that, under the terms of his employment, he was not authorized to execute the contract in question. The evidence of Duckworth, one of the architects who had charge of the matter for the owner, practically corroborates the evidence of Weidner as to his authority to make the contract in question for the defendant. According to Duckworth, Duckworth Bros. Architects, drew the plans and specifications to construct the building, and then had different con-

to be satisfied that he did not have the typewriter that was
sent up to him, and, in fact, he was not satisfied
that there was not in the typewriter, and he did
have a copy of the contract in his files. As to the letter
which was sent by the defendant company on May 7 to New
York City, and, in fact, according to him he sent no
questionnaire for the purpose of the typewriter, and
he recalled that he did not know whether that was done or
his intention. He further recalled that when he first
brought in the letter for the job, he gave him a temporary
figure that was in mind until he got the questionnaire,
which he did not have at that time.

...the president of the National Company, ...
...that he never met any fellow with ...
...the company property, and did not direct him to go to ...
...the company's office and sign the contract. An ...
...then, as testified, that he might have seen the proposal, or ...
...a copy of it, but that he did not believe he ever saw the ...
...that was ...

It is admitted by the defendant that witness was in his employment, and that he was not authorized to execute the contract in question.

tractors figure on them, and on May 7, 1924, they received a letter from the defendant, requesting that Duckworth Bros. send specifications for the work to it, the defendant, and that on May 7, 1924, they sent, by mail, a copy of the specifications to the defendant, together with a letter stating that they were enclosing them pursuant to the defendant's request, in its letter of May 9. The evidence also shows that the contract was awarded to the defendant company, because it made the lowest bid, the bid being \$1090.00, as stated in the letter of March 28, 1924, sent by the defendant to Duckworth Bros., Architects.

It is true that some of the material testimony of Weidner is denied by Ingstrup and by Buhrke, but, nevertheless, it is admitted by Ingstrup that while Weidner requested him, the defendant, to figure on the building in question, and presented certain plans to him, Ingstrup says that Weidner did not present any specifications. Ingstrup admits, however, in his testimony that the defendant had the specifications in its files after they were sent to it, and got them from the architects. It will thus be seen that it is not, in reality, denied by Ingstrup, for the defendant, that the matter of doing the work on the building in question was considered and entertained by the defendant, and a bid made in actual figures, the only denial by Ingstrup being that when it came to the actual signing of the contract, Weidner was without sufficient authority. Certainly, however, considering all the evidence, particularly that of Duckworth, the architect, and the conduct of Ingstrup, which he, himself, testified to, in considering and acting upon the job in question, which had been solicited by Weidner, and

testimony given on May 7, 1934, they received a letter from the defendant, requesting that defendant send specifications for the work to it, the defendant, and that on May 7, 1934, they sent, by mail, a copy of the specifications to the defendant, together with a letter stating that they were enclosing their payment to the defendant's payment, in the letter of May 7. The evidence also shows that the contract was awarded to the defendant company, because it was the lowest bid, the bid being \$1000.00, as stated in the letter of March 28, 1934, sent by the defendant to defendant's agent, Philadelphia.

It is true that some of the material testimony of Volney is denied by Ingstrup and by White, but, nevertheless, it is admitted by Ingstrup that while Volney requested him, the defendant, to figure on the building in question, and presented certain items to him, Ingstrup says that Volney did not present any specifications. Ingstrup admits, however, in his testimony that the defendant had the specifications in its files after they were sent to it, and got them from the architect. It will thus be seen that it is not, in reality, denied by Ingstrup, for the defendant, that the matter of doing the work on the building in question was considered and ascertained by the defendant, and a bid was in actual figures, the only denial by Ingstrup being that when it came to the actual signing of the contract, Volney was without sufficient authority. Certainly, however, considering all the evidence, particularly that of defendant's architect, and the conduct of Ingstrup, which he himself testified to, in considering and acting upon the bid in question, which had been solicited by Volney, and

brought by Weidner to the defendant's attention, the only obvious probability is that the defendant intended to, and did, by reason of the knowledge and conduct of its officers, authorize and sanction the act of Weidner in signing the contract in question. Certainly, in view of the evidence on that subject, it would be highly unreasonable for this court to override the verdict of the jury. If they believed the testimony of Duckworth and Weidner, which was corroborated by certain letters, as against what may be considered merely partial denials by Ingstrup, they were bound, as a matter of reason, to conclude that the evidence justified the conclusion that the defendant entered into the contract in question.

As to the argument that \$1080.00 was an unreasonably low figure for the work in question, it is sufficient to say that the letter of March 28, gave that as the figure for the painting, decorating and wood finishing to be carried out in accordance with the plans and specifications, and later the defendant signed the contract in question to do the work and furnish the materials for that amount.

(2) It is urged that the plaintiff was not entitled to recover \$200.00 damages, which were allowed, presumably, for forty days delay, at \$5.00 per day. The evidence of Duckworth is to the effect "that about a month and a half," or about forty days, elapsed between the time that he first notified the defendant to proceed with the work, and the time the contract was started by the Brennan

brought by witness to the defendant's attention, the
only obvious possibility is that the defendant intended
to, and did, by reason of the knowledge and contact
of the officer, witnesses and others the act of
defendant in signing the contract is justified. Certainly,
in view of the evidence on that subject, it would be
highly unreasonable for this court to overrule the
verdict of the jury. If they believed the testimony
of Goodworth and witness, which was corroborated by
certain letters, as against what may be considered
merely partial facts of defendant, that were found
on a matter of reason, to conclude that the evidence
justified the conclusion that the defendant signed into
the contract in question.

As to the argument that Goodworth was an
unreliable witness for the work in question, it is
submitted to say that the letter of March 28, gave that
as a reason for the making, executing and work
finishing to be arrived at in accordance with the plans
and specifications, and later the defendant signed the
contract in question to do the work and furnish the
materials for that amount.

(3) It is urged that the plaintiff was not
entitled to recover \$800.00 damages, which were allowed.
The plaintiff, for large sums paid, at 25.00 per day, the
evidence of Goodworth is to the effect that about a month
and a half, or about forty days, elapsed between the time
that he first notified the defendant to proceed with the
work, and the time the contract was entered by the defendant.

Company, which was the company that finally did the work for the plaintiff; and, in view of the fact that the contract provided, in Article 2, that the defendant should pay as liquidated damages the sum of \$5.00 for each day of delay, it follows that the jury was justified in concluding that the plaintiff had been damaged to the extent of \$300.00 for the delay caused by the defendant's breach of the contract.

(3) The plaintiff, to prove, in part, the damages which he claimed he had suffered by reason of being compelled to have the work done by others, at the trial, introduced in evidence, over the objection of counsel for the defendant, the contract which the plaintiff made with the Brennan Company, who actually did the work after the refusal of the defendant to go on with the contract. The figure in the Brennan Company contract for the work and materials, was \$1690.00, that is, \$600.00 more than the figure in the original contract between the plaintiff and the defendant.

It was urged for the defendant that the terms of the two contracts varied somewhat, in that the contract with the Brennan Company included more work and material than that between the plaintiff and the defendant. An examination of the two documents shows that there is some difference, but as the trial judge said, both contracts were drawn by the same architect, and refer to the same specifications, and Duckworth, one of the architects, testified that he "used the same plans and specifications in the case of Brennan that were used" in the defendant's contract, and when asked, "Were there any alterations or changes in the plans and specifications, between the Ingstrup Buhrke contract and the Brennan contract?" he

company, which was the company that finally did the work for the plaintiff; and, in view of the fact that the contract provided, in Article 2, that the defendant should pay as liquidated damages the sum of \$5.00 for each day of delay, it follows that the jury was justified in concluding that the plaintiff had been damaged to the extent of \$200.00 for the delay caused by the defendant's breach of the contract.

(2) The plaintiff, to prove, in part, the damages which he claimed he had suffered by reason of being compelled to have the work done by others, at the trial, introduced in evidence, over the objection of counsel for the defendant, the contract which the plaintiff made with the Brownman Company, and actually did the work after the refusal of the defendant to go on with the contract. The figure in the Brownman Company contract for the work was material, was \$1200.00, that is, \$200.00 more than the figure in the original contract between the plaintiff and the defendant. It was argued for the defendant that the terms of the two contracts varied somewhat, in that the contract with the Brownman Company included more work and material than that between the plaintiff and the defendant. An examination of the two documents shows that there is some difference, but as the trial judge said, both contracts were drawn by the same architect, and refer to the same specification, and drawings, one of the architects, testified that he "used the same plans and specifications in the case of Brownman that were used" in the plaintiff's contract, and when asked, "Were there any alterations or changes in the plans and specifications between the plaintiff's contract and the Brownman contract?" he

answered, "No."

Such being the evidence, in our judgment, it was competent, and the Brennan Company contract properly admitted.

For the reasons set forth above, the judgment will be affirmed.

AFFIRMED.

O'CONNOR AND THOMSON, JJ. CONCUR.

Page 11

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245 I.A. 616 #4

234-31366

MARY E. FERGUSON,

Appellant,

vs.

HARMON M. HOWE,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

Opinion filed Monday, June 13, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On March 7, 1925, the plaintiff, Mary E. Ferguson, began an action of trespass on the case in the Circuit Court of Cook County against the defendant, Harmon M. Howe. On April 23, 1925, the plaintiff filed a declaration, which alleged, substantially, the following: That the defendant, her brother, who was engaged in the business of buying and selling bonds, through misrepresentations, persuaded her to turn over to him for sale \$11,000.00 of municipal bonds; that afterwards, he falsely and fraudulently represented to her that he had sold them and had received only \$4,000.00 for them, whereas, as a matter of fact, he had received \$11,000.00 for them; that all together he had paid back to her, for the sale of the bonds, only \$8,000.00, leaving due to her \$3,000.00 of principal and certain interest.

On June 30, 1925, leave was given the plaintiff to change the form of action from tort to assumpsit, and to file instantan an amended declaration; and on that day the plaintiff filed an amended declaration, which alleged, substantially, the following: -

9431A 618

Handwritten signature or initials.

10-11-37

10-11-37

10-11-37

10-11-37

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Opinion filed Monday, June 18, 1937.

MR. JAMES H. HARRIS, JR., Plaintiff, vs. JAMES H. HARRIS, JR., Defendant.

At the Court of Appeals, New York.

On June 1, 1937, the plaintiff, JAMES H. HARRIS, JR.,

filed a petition for summary judgment on the case in the County Court of New York against the defendant, JAMES H. HARRIS, JR., who is the plaintiff's brother. The plaintiff filed a declaration, which alleged, substantially, the following: That the defendant, who was engaged in the business of buying and selling bonds, through misrepresentation, persuaded him to loan over to him for sale \$11,000.00 of municipal bonds; that afterwards, he falsely and fraudulently represented to him that he had sold them and had received only \$4,000.00. The then, when, as a matter of fact, he had received \$11,000.00 of the same. That all together he has paid him for the sale of the bonds, with interest, totaling \$12,000.00, but he has not paid him the principal and interest thereon.

On June 30, 1937, James H. Harris, Jr. filed a motion to dismiss the petition for summary judgment, and on that day the defendant filed an amended declaration, which alleged, substantially, the following:

That on June 30, 1915, the defendant was indebted to her in the sum of \$11,000.00, being the proceeds of the sale of twenty-two \$500.00 municipal bonds of the City of Huron, in the State of South Dakota; that the defendant received \$11,000.00 for the sale of the bonds, but only paid over to her the sum of \$8,000.00, made up of the following items: \$4,000 on June 23, 1915; \$1,000 on July 1, 1916; and \$3,000 on November 18, 1924; that the total indebtedness, principal and interest, still due and unpaid from him to her, was \$5,975.00. The amended declaration in addition to the foregoing, also contained the common counts.

On October 3, the defendant filed a plea of non-assumpsit, and, also, a plea of the Statute of Limitations; it being set up in the latter that he, the defendant, did not, at any time within five years before the commencement of the action, undertake or promise, in manner and form as the plaintiff had charged. On October 10, 1925, the plaintiff filed a replication to the defendant's plea of the Statute of Limitations.

There was a trial before the court, without a jury, and a judgment in favor of the defendant. This appeal is from that judgment.

The plaintiff, Mary E. Ferguson, and the defendant, Harmon E. Howe, are brother and sister. The defendant, in the year, 1915, was in the business of buying and selling bonds, and was connected with a bond house. For a good many years, he dealt in City of Chicago Special Assessment Bonds.

In June, 1915, the plaintiff was the owner of twenty-two \$500.00 City of Huron, South Dakota Bonds, on which interest was paid regularly twice a year. In the early part

On June 30, 1918, the defendant was indicted
to pay to the sum of \$11,000.00, being the proceeds of the
sale of twenty-two 600.00 municipal bonds of the City of
Boston, in the State of South Dakota; that the defendant
received \$11,000.00 for the sale of the bonds, but only
will ever be paid the sum of \$11,000.00, and up to the following
times: \$1,000 on June 30, 1918; \$1,000 on July 1, 1918; and
\$1,000 on August 1, 1918; and the total \$11,000.00.
The defendant was indicted, after the said indictment was
made, on July 1, 1918. The defendant testified in his own
defense, also answered the common questions.
On October 2, the defendant filed a plea of not
guilty, and, also, a plea of the defense of limitation;
it being set up in the latter that he, the defendant, did not
at any time within five years before the commencement of the
action, violate or promise, in written and oral to the
plaintiff and charged. On October 10, 1918, the plaintiff
filed a replication to the defendant's plea of the defense
of limitation.
There was a trial before the court, without a jury,
and a judgment in favor of the defendant. This appeal is from
that judgment.
The plaintiff, Mary E. Ferguson, and the defendant,
Edward M. Howe, are husband and wife. The defendant, in the
year, 1915, was in the business of buying and selling bonds,
and was connected with a bond house. For a year or two
before, he dealt in City of Chicago Special Assessment Bonds.
In June, 1918, the plaintiff was the owner of twenty-
two 600.00 City of Boston, South Dakota bonds, on which
interest was paid regularly twice a year. In the early part

of that year, the plaintiff and the defendant had some talk concerning the bonds, in the course of which, according to the testimony of the plaintiff, her brother told her that the bonds were "no good"; that she would never get the money for them, that the City of Huron was about to stop paying the interest on them; that the best thing for her to do was to let him take them and see what he could get for them. She testified that he told her that story for weeks and weeks, and that finally, about January 23, 1915, she gave him the bonds to sell. The defendant took the bonds, and according to his testimony, sold them to one Kimball, who at the time of the trial, was dead. The defendant claimed that he got only \$4,000.00 for the twenty-two bonds.

There was offered in evidence for the defendant, a document dated, Chicago, June 29, 1915, which is as follows:

"Mr. H. M. Howe,
Bought of Mrs. Mame Ferguson,
11,000.00 City of Huron, South Dakota, 24 Bonds,
dated January 2, 1890, due January 2, 1922, for 4000.00
less interest from 6/23/15 to 7/2/15 8.32
3991.68
Received Payment,
(Signed) MAME FERGUSON."

It is the evidence of the plaintiff that the defendant took the bonds and sold them, and on June 29, called her up, and she went to his office, and he gave her \$500.00 in cash and \$3500.00 in Park Ridge and Chicago Bonds; that her brother told her that was all he could get; that he said he sold them to a pawnbroker in the South. She further testified that a year later, in 1916, her brother was ill at her house, and told her "that he did not feel right about the bonds, and he gave me a note for one thousand dollars;" that "He said when that thousand was paid he would give me another,

and he would continue to give me another note for a thousand until he would give me the face value;" that "he did not feel right about it, did not do the right thing by me, He was going to pay me the full amount;" that in the fall of 1916, he paid the \$1,000.00 note; that at that time she believed \$4,000.00 was all he got for the bonds; that she first learned in October, 1924, that he had received more than \$4,000.00 for the bonds; that she talked to one Dunning, a lawyer about the matter, and that Dunning wrote to the City of Huron and found that the bonds had been paid in full; that Dunning then called up her brother and told him that she had left the matter in his, Dunning's hands, for collection. She testified, also, that after she found out that he got the face value of the bonds, she went over to his office and told him that she needed some money, and said, "You know you owe me money," and her brother said, "Well, I will tell you what I will do. I will give you this interest note for \$3,000.00," that at that time her brother gave her a check for \$1,000.00, and a note for \$3,000.00, which note was paid about a year later; that at that conversation, when she spoke of the \$11,000.00, her brother said, "I am going to pay up;" that he further said, "In January I am going to sell some bonds, and I will pay you the other \$3,000.00; that will make the \$11,000.00."

The evidence for the plaintiff is corroborated by the testimony of Albert E. Dunning, a lawyer, whom the plaintiff retained in October, 1924. This suit was begun by Dunning, for the plaintiff, but at the actual beginning of the trial, on the ground that he expected to testify, he withdrew, and other attorneys were substituted in his stead. The evidence is to the effect that after being retained, he wrote

and he would continue to give no evidence until he was
satisfied that he would give no the least evidence; that he
did not feel right about it, did not do the right thing by me,
he was going to pay me the full amount; that in the fall of
1911, he paid me the \$1,000.00; that at that time the
plaintiff was not at all in the money;
that the first payment to plaintiff, \$1,000.00, was paid in 1911;
that from \$1,000.00 for the balance; that the balance in 1911
amounted to a further sum of the money; and that plaintiff was
in the city of Kansas and Kansas State the money had been paid;
in 1911, that plaintiff had called on her brother and told
him that she had told the matter in his, defendant's hands; for
collection. The plaintiff, also, that after she found out
that he was the face value of the money, she was even to him
at that time and told him that she needed some money, and said,
"I've been you give me money," and her brother said, "Well, I
will tell you what I will do. I will give you this interest
note for \$2,000.00," that at that time her brother gave her a
check for \$1,000.00, and a note for \$2,000.00, which note
was paid about a year later; that at that conversation, when
she spoke of the \$1,000.00, her brother said, "I am going to
pay you," that he further said, "In January I am going to sell
some bonds, and I will pay you the other \$2,000.00; that will
make the \$1,000.00."

The evidence for the plaintiff is corroborated
by the testimony of Albert A. Kuntz, a lawyer, whom the
plaintiff retained in December, 1922. This suit was begun
by Kuntz for the plaintiff, and at the actual beginning of
the trial, on the ground that he expected to testify, he was
drawn, and after testimony was substituted in his stead. His
evidence is to the effect that after being contacted, he was

to Huron, South Dakota, about the bonds, and after he got a reply that the bonds were paid in full, consulted the plaintiff, and, then, on November 13, 1934, telephoned the defendant, to make an appointment, with him, and that at that interview, the defendant having said that he did not have time to see Dunning, and Dunning then saying, "I have got a matter in my hands for your sister for the amount of money that you embezzled from her on the sale of these bonds, these South Dakota Bonds," the defendant said, "Wait a moment, I will be up in your office in ten minutes;" that, accordingly, the defendant came to his office; that when he asked the defendant if he was ready to pay the balance due on the bonds, the defendant said, "No. I could not pay them if I wanted to;" that then Dunning said, "That is up to you. You had that money, collected that money, and only paid off \$4,000.00;" that the defendant said, "I paid over another thousand at another time, and paid another at another, which makes \$8,000.00 in all;" that he asked the defendant "where is your evidence?"; that there was some further discussion of the account, and then the defendant said, "I am not able to pay - I cannot pay all now. If I had a little time, I would like a little time to think this matter over;" that they then agreed to a meeting the following morning; that the defendant said, "All right he would see what he could do;" that the next morning, the defendant called, and when asked by Dunning if he was ready to pay, said, "No, I am not. I have got property and securities if I have some time to get them together;" that Dunning then said to him, "Well, you get the money, there is no question now about it, you have collected the full amount of these bonds."

to know, could hardly about the bonds, and when he got
a reply that the bonds were paid in full, mentioned the
plaintiff, and, then, on November 12, 1932, telephoned the
defendant, to make an appointment, with him, and that at that
time, the defendant having said that he did not have time
to see him, and would call on him, "I said that I would
in my house for your sister and the amount of money that you
mentioned that you had on the date of your death, there were
about \$2000," the defendant said, "I will be
up in your office in ten minutes," and, accordingly, the
defendant came to his office; that when he asked the defendant
if he was ready to pay the balance due to the plaintiff, the
defendant said, "No, I would not pay them if I wanted to,"
that then defendant said, "That is up to you, you had your money,
collected that money, and only paid out \$1000," and the
defendant said, "I paid over another thousand at another time,
and paid another at another, which makes \$2,000 to date,"
that he asked the defendant "where is your money?" that
there was some further discussion of the amount, and then the
defendant said "I am not able to pay - I cannot pay all now,
if I had a little time, I would like a little time to bring
this matter over," that they then agreed to a meeting the
following morning; that the defendant said, "All right he
would see what he could do," that the next morning, the
defendant called, and when asked by plaintiff if he was ready to
pay, said, "No, I am not, I have got property and securities
if I have some time to get them together," that following week
said to him, "Well, you got the money, there is no question
now about it," you have collected the full amount of those bonds.

He admitted he did;" that he, the defendant, further said that he could pay if he was given time; that it was agreed that he should have until the following Monday, at ten o'clock, to pay; that he, Dunning, said to the defendant, "Let us have one thing understood, the amount that we have collected and the balance that you owe us;" that it was understood (the evidence is not very clear on this) that the defendant had paid, altogether, to the plaintiff, \$5,000.00; that he did not see the defendant again until after suit was brought. Dunning further testified that in January, 1925, he called the defendant up on the telephone, and "asked him if he was ready to pay the balance, as agreed to, with Mrs. Ferguson;" that the defendant answered, "No, nothing doing," that he was going to fight it.

On cross-examination, when Dunning was asked what was the conversation with him in regard to the \$11,000.00, he answered, "Why, he admitted that he owed it to her;" and when asked, "He told you that he got \$11,000.00 for the bonds?" he answered, "Yes, he told me he did," and when asked, "But he did not say that he got \$11,000.00 for these bonds, did he, you said it?" he answered, "I said to him, and he acquiesced in it, he said he did," and that the defendant said, "I have plenty of securities if I have time to pay up, I will pay the whole damn thing up."

The testimony of the plaintiff, also that of Dunning, was in part, corroborated by the testimony of one Appleton, Clerk of the Board of Local Improvements of Chicago. His evidence is to the effect that he had known the

plaintiff and the defendant for six or seven years; that in the latter part of November, 1924, at the Board of Local Improvements, he had a talk with the defendant; that, not having seen the plaintiff for over a year, he asked the defendant about her, and the defendant said, "I saw her the other day, and I gave her \$3,000.00;" that the defendant said he had sold some Western Bonds, and the payment he made to her was for bonds that he had sold for her; that in the course of the conversation, the defendant said, "She is doing nicely. She still has more coming."

The evidence of the defendant is contradictory to that of the plaintiff, and that of Dunning, and Appleton. He admitted that he discussed the bonds with the plaintiff in the early part of the year 1915, and it is his evidence that he received the bonds from her to sell, and that he sold them to a man by the name of Kimball, who had an office at La Salle and Washington Streets, but who, at the time of the trial, was dead; that after selling them to Kimball, he sold them for Kimball to one Bernell, a mail carrier, who afterwards told him, the defendant, that he had collected the full amount of the bonds. It is the defendant's claim, not only that he sold the bonds for \$4,000.00, but that he paid his sister that amount, and at the time, June 29, 1915, received from her the document set forth above, which purports to recite the purchase of the bonds by him from her for \$4,000.00, and the payment to her of that amount, less a small amount of interest. As to the payment of other sums to his sister, subsequent to 1915, he testified that he never gave her any further money on account of the bonds. When asked as to the payment of the \$1,000.00, which the plaintiff

At issue and the defendant for the return of the same. The latter part of November, 1904, at the Board of Trade, defendant, he had a talk with the plaintiff; that, not having seen the plaintiff for over a year, he asked the defendant about her, and the defendant said, "I saw her the other day, and I gave her \$5,000.00." That the defendant said he had sold some Western bonds, and the payment he made to her was for bonds that he had sold for her; that in the course of the conversation, the defendant said, "She is doing nicely. She will pay me soon."

The evidence of the defendant is contradictory to that of the plaintiff, and that of himself, and appears to admit that he discussed the bonds with the plaintiff in the early part of the year 1913, and it is his evidence that he received the bonds from her to sell, and that he sold them to a man by the name of Kimball, who had an office at 1414 and Washington Street, but who, at the time of the trial, was dead; that after selling them to Kimball, he sold them for Kimball to one Kimball, a well known attorney, who afterwards told him the defendant, that he had collected the full amount of the bonds. It is the defendant's claim that only that he sold the bonds for \$4,000.00, but that he paid his sister that amount, and at the time, June 28, 1913, received from her the document set forth above, which purports to receive the payment of the bonds by his firm for \$4,000.00, and the payment for her of that amount, less a small amount of interest, as he the payment of other sums to his sister, subsequent to 1913, he testified that he never gave her any further money in account of the bonds. When asked as to the payment of the \$1,000.00, which the plaintiff

testified he gave to her in 1918, his testimony is somewhat ambiguous and confusing, and, apparently, does not explain, in any satisfactory way, that payment. He testified that he was ill at the time, and making plans to go to Hot Springs; that his daughter was living with the plaintiff and he wanted to provide for her, in case anything happened to him, and to do so, gave the plaintiff a note (he does not state what is its amount), and \$1000.00, in Special Assessment Vouchers, with the understanding that if anything happened to him, she would use the money for the benefit of his daughter; "that there was nothing said as to whether or not it was to be turned back to me upon my coming back."

He further testified that, in November, 1924, he had another transaction with his sister; that she told him she had a \$1500.00 chattel mortgage note which was due, and unless it was taken care of at once, her rooming house, very likely, would be foreclosed, and asked him for a loan of \$1500.00; that he gave her a trust deed note, for \$3,000.00, and told her to go to the bank and see if she could get a loan of \$1500.00 on the \$3,000.00 note; "that as she could not get a loan at the bank, he got one O'Connor, to advance the money to her. He, the defendant, further testified that about November 23, 1924, he paid the plaintiff \$1,000.00 in cash, and gave her a trust deed note for \$3,000.00, and that he turned that cash and note over to her because she had a chattel mortgage note that had to be paid right away; that it was not because Dunning was pressing him that he gave her the cash and note; that he never demanded of his sister the repayment of the \$3,000.00; that is, the cash of \$1,000.00, and the amount of the note, which was

testified he gave to her in 1912, his testimony is somewhat
ambiguous and confusing, and, apparently, does not explain
in any satisfactory way, that payment. He testified that he
was ill at the time, and making plans to go to the hospital;
that his daughter was living with the plaintiff and he wanted
to provide for her. In that connection he said, and he
to me, that the plaintiff's wife (the one who was with him
the night) and himself, in making payment to her, the
wife was making what he termed "the payment" to her, the
there was nothing else on the subject as to it was to be
turned back to me when my money came.

He further testified that, in November, 1912, he
had contact with his sister; that she told him
she had a \$100.00 check which was due, and
which it was taken care of at once, but looking upon very
likely, would be forgotten, and asked him for a loan of
\$100.00, that he gave her a check dated Nov. 1, 1912, for \$100.00,
and said that he was to pay the bank and was to the bank for a
loan of \$100.00 on the 15th of Nov. 1912, that he would
not get a loan of the bank, he got one O'Connor, he advanced
the money to her. He, the witness, testified that
about November 22, 1912, he paid the plaintiff \$100.00 in
cash, and gave her a check dated Nov. 22, 1912, for \$100.00,
he turned that cash and note over to her because she had a
check which was due that had to be paid that way;
that it was not because Manning was overpaying him that he
gave her the cash and note; that he never intended to
his sister the repayment of the \$100.00; that in the
sum of \$100.00, and the amount of the note, which was

paid when it was due.

As to the testimony of Dunning, the evidence of the defendant is, that he talked with Dunning about the bonds, and Dunning told him there ought to be some settlement made, that he did not think the defendant had treated his sister properly; that nothing was said about the amount he, the defendant, received on the bonds; that he told Dunning that he, the defendant, had received \$4,000.00; that nothing was said about \$11,000.00; that he did not promise Dunning that he would pay his sister anything on the bonds above the \$4,000.00.

The evidence of Earnell, the mail carrier to whom the defendant testified he sold the bonds for Kimball, is to the following effect: That he had known the defendant for a great many years, and had bought bonds from him at numerous times; that in July, 1915, he bought the bonds in question from the defendant; that the defendant said he "thought they were good; they would be paid when they were due;" that in buying the bonds, he "traded some and gave him (the defendant) a check for a small amount in exchange;" that what he paid for them amounted to \$8,000.00 and interest; that the date of the maturity of the bonds was January 2, 1933; that the specified interest on the bonds (the time is not stated) was reduced from six to three per cent per annum; that at the time he bought the bonds from the defendant in July, 1915, the defendant said the interest was very low, but that at \$8,000.00 they would average between five and six per cent; but as to the principal he said that "he thought they were good; they were to be paid when they were due," that as a matter of fact, they were paid shortly after they were due; that he held them

they were sold shortly after they were due; that he held them
 who he sold when they were due," that at a matter of \$500,
 the witness he said that he thought they were good, they
 they would advance between \$100 and \$150 each; but as he
 defendant said the interest was very low, but that at \$500.00
 time he bought the bonds from the defendant in July, 1913, the
 reduced "for six to three per cent per annum, that of the
 specified interest on the bonds (the time is not stated) was
 at the maturity of the bonds was January 7, 1920; that the
 tax then amounted to \$5,000.00 and interest; that the date
 a check for a small amount in exchange; that when he paid
 buying the bonds, he created some and gave him (the defendant)
 two bonds; they would be paid when they were due," that in
 time the defendant, that the defendant said he thought they
 time; that in July, 1913, he bought the bonds in question
 most many years, and had bought bonds from him at various
 the following effect: That he had known the defendant for a
 the defendant testified he said the bonds for himself, as to
 The witness of Barnell, the well known to him

from July, 1915, to January 2, 1923; that there was a little difficulty in collecting the last three coupons because they were not properly signed.

It will be seen from the foregoing that the substantial question in the case, apart from that of the Statute of Limitations, is, whether the evidence justifies the conclusion that the defendant, when he sold the bonds, received more than \$4,000.00 for them.

The evidence of the plaintiff that in 1916, her brother was ill at her house, and told her "that he did not feel right about the bonds" and gave her a note for \$1,000.00, and said "when that thousand was paid he would give (her) another," and would continue to give her "another note for a thousand until he would give (her) the face value;" that "he did not feel right about it, did not do the right thing by (her). He was going to pay (her) the full amount;" that she had talked with him after she found out, as she said, that he got the face value of the bonds, and he then gave her \$3,000.00, made up of a check for \$1,000.00, and a note for \$2,000.00; that at that conversation, when she spoke of the \$11,000.00, he said he was going to pay up; that "In January I am going to sell some bonds, and I will pay you the other \$2,000.00; that will make \$11,000.00;" the evidence of Dunning that he said to the defendant "you get the money, there is no question now about it, you have collected the full amount of these bonds;" that the defendant admitted he had, and that he could pay up if he were given time; that the defendant told him, Dunning, that he got \$11,000.00 for the bonds; that the defendant said, "I have plenty of securities

from July, 1911, to January 4, 1912; that there was a
little difficulty in collecting the last three months
because they were not properly signed.
It will be seen from the foregoing that the defendant
was in the bonds, about five days of the State of
California, in violation of the evidence furnished the
evidence that the defendant, after he sold the bonds, received
more than \$1,000.00 for them.
The statement of the defendant made in 1912, was
that he had not received, and sold for \$1,000.00
right about the bonds, and gave him a note for \$1,000.00.
and said "when that statement was made he would give (him)
another," and would continue to give him "another note for a
statement until he would give (him) the same value," that
"as this was right about it, did not do the right thing
by (him). He was going to pay (him) the full amount," that the
defendant talked with him after the bonds were sold, and the
defendant gave him the bonds, and he then gave him
\$1,000.00, made up of a check for \$1,000.00, and a note for
\$1,000.00; that at that conversation, when the speaker of
the \$1,000.00, he said he was going to pay up; that "in
January I am going to sell some bonds, and I will pay you
the other \$1,000.00; that will make \$1,000.00," the witness
of January that he said to the defendant "you get the money,
there is no question now about it, you have collected the full
amount of those bonds," that the defendant admitted he had,
and that he would pay up if he were given time; that the
defendant told him, meaning, that he got \$1,000.00 for the
bonds; that the defendant said, "I have plenty of securities

if I have time to pay up, I will pay the whole damn thing up;" the evidence of puleston, that in the latter part of November 1824, he talked with the defendant, and the defendant said he had recently seen the plaintiff and had given her \$3,000.00; that he had sold some Western Bonds, and that the payment he made to her was for bonds that he had sold for her; that he further said, "he still has more coming," all taken together is very convincing evidence that the defendant received the face value of the bonds, and did not pay back to his sister, the plaintiff, but \$8,000.00.

The defendant's denial of the explicit testimony of Dunning, and his somewhat ambiguous explanation of the two payments of \$1,000.00 each, and the note of \$2,000.00, and its payment, are not persuasive. Considering all the evidence, we are of the opinion that it was manifestly against the weight of the evidence to hold that the defendant did not receive the face value of the bonds.

As the record appears before us, we are unable to determine whether the trial judge entered judgment for the defendant on the ground that the plaintiff had failed to prove that the defendant received the face value of the bonds, or whether he entered judgment on the ground that the defendant's plea of the Statute of Limitations was good.

It is urged for the defendant that the plaintiff's claim, whether it be considered in contract, or in tort, is barred by the Statute of Limitations. The issue finally made by the pleadings was one of contract, and the evidence offered and introduced must be considered, therefore, as presented, on that theory. That being true, and the evidence showing that on June 23, 1815, the plaintiff gave the bonds to

IT IS WORTHY FOR THE DEFENDANT THAT THE PLAINTIFF'S
CLAIM, WHETHER IT BE CONSIDERED IN CONNECTION OR IN ISOLATION,
BEING BY THE NATURE OF LIMITATIONS. THE COURT TIMELY
MADE BY THE PLAINTIFF WAS ONE OF CONFESSION, AND THE EVIDENCE
PRESENTED, ON THAT THEORY. THAT BEING TRUE, AND THE EVIDENCE
SHOWING THAT ON JUNE 22, 1915, THE PLAINTIFF HAD THE BONDS IN
POSSESSION, AND THAT THE DEFENDANT RECEIVED THE SAME VALUE OF THE BONDS, OR
EQUIVALENT ON THE MARKET, THE PLAINTIFF HAD FAILED TO PROVE
DAMAGES AGAINST THE INITIAL JUDGE'S JUDGMENT. THE JUDGE
IN THE SECOND APPEAL BEING THAT WE ARE UNABLE TO
RECOVER THE TRUE VALUE OF THE BONDS.

the defendant to sell, he then became her agent, and immediately upon making a sale of them, the money he received was that of, and belonged to, the plaintiff, and there then arose, at once, an obligation on him to pay it to her, and if, afterwards, he undertook to deceive his sister and pretend that he received only \$4,000.00, that conduct, which was, in its nature, a tort, was nevertheless, something that happened subsequent to the arising of the obligation to pay; that is, the obligation to pay for which assumpsit would lie, gave rise to a cause of action ex contractu before any cause of action ex delicto came into being.

It is contended for the defendant that the Statute of Limitations in tort, and not in assumpsit, should govern, and that the plaintiff's claim is barred on the ground that no payment, or subsequent promise, would revive an obligation growing out of tort. There is no doubt that the Statute of Limitations would be a good plea to a declaration in case filed in 1925, based on a tort committed in 1915 - Nelson v. Pettersen, 229 Ill. 340 - but where, as here, the amended declaration was based on a cause of action in contract, the subsequent promise of the defendant to pay, which, we are of the opinion, the evidence sufficiently proves, operated to restore and revive the remedy of the original cause of action for money had and received. In our judgment, after analyzing and considering carefully all the evidence, considering particularly the discrepancies in the testimony of the defendant, and the persuasive effect of the testimony of the plaintiff, together with that of Dunning and Appleton, we are of the opinion that it proved, by an obvious preponderance, an unqualified admission on the part of the defendant that he owed the

the defendant to sell, he then became non compos and
immediately upon making a sale of them, the money so received
was lost or, and delivered to, the plaintiff, and there upon
there, at once, an obligation on him to pay to her, and that
affirmed, he undertook to deliver his sister and brother and
he received only \$4,000.00, that money, which was, in
the instant, a sum, was nevertheless, according to the
agreement of the parties to the obligation to pay, that is,
the obligation to pay for which amount would be, have this
to a sum of action in money, by which any other of action
an action was also being.
It is contended for the defendant that the
of limitation is not, and not in substance, which is
and that the plaintiff's claim is barred on the ground that no
payment, or subsequent promise, would revive an obligation
existing out of debt. There is no doubt that the statute of
limitations would be a good plea to a declaration in case filed
in 1926, based on a debt contracted in 1915 - Wells v. Peterson.
But the III, 220 - but where, as here, the amended declaration
was based on a kind of action in contract, the subsequent
payment of the defendant to pay, which, we are of the opinion,
the evidence sufficiently proves, operated to renew and revive
the remedy of the original cause of action for money had and
received. In our judgment, after analyzing and considering
carefully all the evidence, considering particularly the
discrepancies in the testimony of the defendant, and the
persuasive effect of the testimony of the plaintiff, together
with that of the learned and able judge, we are of the opinion
that it proved, by an obvious preponderance, an unqualified
admission on the part of the defendant that he owed the

plaintiff a balance of principal amounting to \$3,000.00, together with interest, and, also, that, within five years of suit, he expressed the intention of paying it.

The evidence shows that the amount, including principal and interest at five per cent per annum, at the time of the judgment, was \$6,039.04. The judgment of the trial judge, therefore, will be reversed and judgment entered here, with a finding of fact, in the sum of \$6,340.99, being the sum of \$6,039.04, plus interest at five per cent from June 7, 1928, to date.

REVERSED WITH A FINDING OF FACT
AND JUDGMENT HERE.

FINDING OF FACT: We find that the defendant owed the plaintiff a balance of \$3,000.00 and interest; and that within five years of suit, he expressed his intention of paying it.

O'CONNOR AND THOMSON, JJ. CONCUR.

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MARY L. PILLSBURY,

Appellee,

v.

PATRICK H. EARLY, Adminis-
trator of the Estate of
John Early, Deceased,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

OPINION filed Monday, June 13, 1927.

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

Mary L. Pillsbury, hereinafter called plaintiff,
on January 26, 1921, filed her claim in the Probate Court
of Cook County against the Estate of John Early, deceased.
The claim was in the form of a declaration on the common
counts for work done and services performed and the damages
were laid in the sum of \$15,000.00. There was a nominal
hearing in the Probate Court where the claim was allowed
for \$100.00, an appeal was taken to the Circuit Court of
Cook County, where there was a verdict and a judgment in
plaintiff's favor for \$7500.00 and this appeal followed.

On May 5, 1926, we filed an opinion in the case
in which the judgment of the Circuit Court was reversed.
Pillsbury v. Early, 240 Ill. App. 419. The case was taken
on certiorari to the Supreme Court, where the judgment of
this court was reversed and the cause remanded with directions
to consider the merits of the case. Pillsbury v. Early, 324
Ill. 562.

3421. V. 613

[illegible]

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ORIGINAL FILED MONDAY, JUNE 15, 1987.

to change his behavior according to what he

1975-1976

with a preliminary, non-binding, meeting for the purpose of discussing the proposed plan, and the results of the meeting were to be reported to the Board of Directors. The Board of Directors, in its resolution, also authorized the President to appoint a committee to study the proposed plan and to report to the Board of Directors at its next meeting. The Board of Directors, in its resolution, also authorized the President to appoint a committee to study the proposed plan and to report to the Board of Directors at its next meeting. The Board of Directors, in its resolution, also authorized the President to appoint a committee to study the proposed plan and to report to the Board of Directors at its next meeting.

On July 1, 1941, the following was received from the
 Director of the Bureau of Investigation, Washington, D. C.
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 Director of the Bureau of Investigation, Washington, D. C.
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 Director of the Bureau of Investigation, Washington, D. C.

In the former opinion of this court we held that it had been judicially determined in a suit for specific performance filed by Mary L. Pillsbury against the Early heirs in the Superior Court of Cook County, that there was no oral agreement entered into between Mrs. Pillsbury and the deceased, whereby he agreed to give her the farm at Franklin Park in consideration for services to be rendered by her, because the decree in the Superior Court in that case was affirmed by the Supreme Court of this state. Pillsbury v. Early, 304 Ill. 420. The answer to the bill set up inter alia that the oral agreement which Mrs. Pillsbury had contended was entered into between herself and John Early was void under the Statute of Frauds but that question was not considered as appears from the oral opinion rendered by the chancellor and by the opinion of the Supreme Court and apparently that defense was abandoned. Our conclusion was there reached because we held that Mrs. Pillsbury had been defeated on the merits of her claim in the specific performance case, - that it was there held that she had failed to prove that there was an oral contract between her and John Early on which she based her suit and not that she was barred on account of any procedural matter, and for the reason we did not pass on the other points urged in the briefs filed. The Supreme Court, however, held that we were in error for the reason that although Mrs. Pillsbury might not be able to recover upon an express contract, yet she might, upon proper showing, recover for the value of the services rendered by her to Early, upon an implied contract and the case was sent back to this court for us to pass upon the merits. (324 Ill. 562).

In the former opinion of this court we held that it had been judicially determined in a suit for specific performance filed by Mrs. A. Williams against the Earl of Salisbury that there was no agreement entered into between Mrs. Williams and the Earl, which he agreed to give her the sum of £10,000, but in consideration for services to be rendered by her, and when the facts in the former case in that case were affirmed by the House of Lords of this country. Williams v. Earl of Salisbury, 111. 230. The court in the said case held that the said agreement which Mrs. Williams had entered into between herself and the Earl was void under the Statute of Frauds and that the same was not enforceable as against the Earl of Salisbury and the Earl of Salisbury and by the action of the House of Lords and the House of Commons was affirmed. The result of the case was that the court held that Mrs. Williams had been defrauded on the basis of her claim in the specific performance case, - that it was there held that she had failed to prove that there was an oral contract between her and the Earl on which she based her suit and not that she was defrauded on account of any fraudulent matter, and for the reason we did not pass on the other points urged in the writs filed. The House of Lords, however, held that we were in error for the reason that although Mrs. Williams might not be able to recover upon an express contract, yet she might, upon proper showing, recover for the value of the services rendered by her to the Earl, upon an implied contract and the case was sent back to this court for us to pass upon the writs. (111. 230).

In the briefs filed in this court on behalf of Mrs. Pillsbury, it is expressly stated that she bases her cause of action upon an express contract entered into between her and John Early, whereby it was agreed that in consideration of personal services to be rendered by her he would, at his death, give her the farm which he owned in Franklin Park and that she should also receive one-half of the produce of the farm. It is there further specially stated that her claim is not based upon an implied contract. And the record discloses that that was the theory on which the cause was tried in the Circuit Court. But in the petition for the writ of certiorari and briefs filed in the Supreme Court, which counsel had furnished us at our request, it appears that Mrs. Pillsbury shifted her position and there contended that her claim was based upon an implied contract, whereby she was to be paid for her services upon a quantum meruit. Her counsel there said: "The present suit is an action at law (quantum meruit) on a claim filed" and again "A perusal of the abstract (p.2) discloses the claim filed herein is one on the common counts reciting that the estate is indebted to the plaintiff for 'work and services' furnished by the plaintiff to John Early, deceased, which allegations are commonly known as the indebitatus assumpsit or quantum meruit counts. It is plain both suits are actions ex contractu but the chancery suit rests upon the express oral promise of the parties while the present suit depends upon the promise which the law implies." Although as above stated, the case was tried in the Circuit Court on the theory of an express contract and the instructions were on that theory and the argument in this court is on the same theory and we have no other briefs filed before us, yet

In the briefs filed in this court on behalf of Mrs. Wilbur, it is repeatedly stated that the same has been at various times an assignee, mortgagee, and holder of the same. It is further stated that it is well known to the public that the same was assigned to her by her husband, and that she should also receive one-half of the proceeds of the same. It is further repeatedly stated that her claim is not based upon an implied contract, but the same is based upon the theory on which the same was tried in the Circuit Court. But in the petition for the writ of habeas corpus and writs filed in the Supreme Court, which counsel had furnished us at our request, it appears that Mrs. Wilbur alleged her position and there was stated that her claim was based upon an implied contract, thereby she was so said to be entitled upon a WRITING UNDER THE HAND AND SEAL. The present suit is an action at law (common counts) on a claim filed, and again "a payment of the amount" (p. 2). Also the claim filed herein is one on the common counts reciting that the estate is indebted to the plaintiff for work and services, furnished by the plaintiff to John Early, deceased, which allegations are generally known as the implied contract or implied right counts. It is plain both sides are entitled to discovery and discovery will result upon the exposure and hearing of the parties with the present suit depends upon the question which the law implies. Although as above stated, the case was tried in the Circuit Court on the theory of an express contract and the instructions were on that theory and the argument in this court is on the same theory and we have no other briefs filed before us, yet

we are of the opinion that in view of the argument in the Supreme Court and in view of the opinion of the Supreme Court, it is our duty to pass upon the case as though the claim were based and the matter tried upon an implied contract theory.

The evidence shows that Mrs. Pillsbury, at the request of John Early, since deceased, moved from Chicago in 1907 to Early's "farm" which consisted of about two square blocks of land located in Franklin Park, a suburb of Chicago, where she did household work, taking care of Early's elderly parents and working upon the farm and took care of the livestock; that John Early's father lived at Franklin Park, but a short time when he left and went to live with another one of his children; that John Early's mother lived on the farm until her death, which occurred January 18, 1907, and that John Early died January 22, 1920, so that Mrs. Pillsbury performed services for about thirteen years, from 1907 to 1920. John Early sometime after 1907 bought two more blocks of ground so that the "farm" at the time of his death consisted of about four blocks of land. The evidence further shows that the farm at the time of John Early's death was worth about \$15,000.00 and a witness for plaintiff testified that the reasonable value of the services rendered by Mrs. Pillsbury was \$25.00 to \$35.00 per week. On the trial the position of the defendants was that Mrs. Pillsbury had been employed by John Early to render services for which she was paid wages and that she had been paid up to September 1, 1919. The evidence in the record is not materially different from that in the record in the specific

we are of the opinion that in view of the arguments in the
supreme court and in view of the opinion of the supreme court
it is our duty to give upon the most as though the claim
were based on the matter tried upon an implied contract
The evidence shows that Mrs. Ellingworth, at the
request of John Kelly, alone deceased, moved from Chicago
to St. Louis, Mo., which was about the year 1907.
The evidence shows that John Kelly, who resided at about 1907
at Chicago, where she had purchased some, having been of
Kelly's ability person and residing with the firm and John
were at the time; that John Kelly's father lived at
St. Louis, Mo., but a short time when he left and went to live
with another one of his children; that John Kelly's mother
lived on the farm until her death, which occurred January 19,
1907, and that John Kelly died January 22, 1907, so that
Mrs. Ellingworth remained at St. Louis for about thirteen years,
from 1907 to 1920. John Kelly executed about 1907 a power
two more blocks of ground so that the "farm" at St. Louis of
his death consisted of about four blocks of land. The
evidence further shows that the time of the time of John
Kelly's death was about 1907, 1908, and a witness for
plaintiff testified that the reasonable value of the services
rendered by Mrs. Ellingworth was \$25.00 per week.
On the trial the question of the balance was that Mrs.
Ellingworth had been assigned by John Kelly to render services
for which she was paid wages and that she had been paid up
to September 1, 1907. The evidence in the record is not
materially different from that in the record in the specific

performance case as appears by the opinion of the Supreme Court, 304 Ill. 430, where the facts as disclosed by the evidence are accurately stated and to which opinion we refer for more detail statement of the evidence.

On the trial of the cause in the Circuit Court there were no instructions asked or given, advising the jury as to what they should consider in making up the amount of their verdict in case they found for the plaintiff.

The defense contends that the verdict and judgment are not supported by the evidence and that the acceptance by Mrs. Pillsbury of a check from John Early on August 19, 1919, for \$1132.00 on the face of which appeared the words "in full to September 1, 1919," amounted to an accord and satisfaction of all claims which Mrs. Pillsbury might have against John Early prior to September 1, 1919, she having cashed the check. We think neither of these contentions can be sustained. There is no dispute but that Mrs. Pillsbury was industrious and faithfully worked long and hard for the deceased, John Early. There is no dispute in the evidence as to the value of those services and whether the acceptance of the check amounted to an accord and satisfaction was left for the determination of the jury under an instruction submitted by the defendant and they having found in favor of the plaintiff, we think we would not be warranted in holding that their verdict was against the manifest weight of the evidence.

The defendant further contends that the court erred in failing to instruct the jury as requested, that in case they found a verdict for the plaintiff, she could

performance was an attempt by the opinion of the jury
and, the fact, that the fact as stated by
the evidence was completely stated and to which opinion
he refers for more detailed statement of the evidence.

On the trial of the case in the District Court there
were no instructions asked or given, advising the jury as to
that they should consider in making up the matter of their
verdict in case they found for the plaintiff.

The defense contends that the verdict and judgment
was not supported by the evidence and that the receipt
given by Mrs. Williams of a check from John Early on August
12, 1915, for \$125.00 on the date of which occurred the
murder "in full for September 1, 1915," amounted to an admission
and confession of all claims which Mrs. Williams might have
against John Early prior to September 1, 1915, and having
received the check, he took notice of those contents and was
satisfied. There is no dispute but that Mrs. Williams
was instructed and deliberately acted and held for the
defendant, John Early. There is no dispute in the evidence
as to the value of those services and whether the defendant
also check amounted to an account and satisfaction was left
for the determination of the jury under an instruction sub-
mitted by the defendant and they having found in favor of the
plaintiff, we think we would not be warranted in holding
that their verdict was against the manifest weight of the

The defendant further contends that the court
erred in failing to instruct the jury as requested, that in
case they found a verdict for the plaintiff, and could

not recover for a longer period than five years prior to the death of John Early - that the statute of Limitations barred all of her claim except for those services which she had rendered within five years next preceding John Early's death. We think this contention must be sustained. Gladville v. McDole, 347 Ill. 34, 41; Freeman v. Freeman, 65 Ill. 106, 109; Miller v. Ginnason, 168 Ill. 447. In the Gladville case Eva Gladville entered into an oral agreement with John P. Jester, whereby she was to render personal services and to receive in payment therefor, after Jester's death, a farm owned by him. She rendered the services for a number of years and after Jester's death in a partition proceeding brought by some of his heirs, Eva Gladville, one of the defendants interposed her bill for specific performance of the contract entered into between her and Jester. On the merits she proved her case and the Supreme Court held that she was entitled to have the contract specifically performed in equity, because if she was remitted to her action at law, the parol agreement was void under the Statute of Frauds and she could recover for her services upon a quantum meruit only for a period of five years and to prevent this fraud equity would grant her relief. The court said (p.41) "In this case there could be no recovery at law, for the labor sacrifices and deprivations of Eva Gladville during ten years of service, which were worth as much as the land was then worth, for the reason that any claim for them was outlawed by the Statute of Limitations long ago." In the Freeman case a son after he had attained his majority, left home and later at the request of his father returned and rendered services for twenty-three years under the expecta-

and recovery for a longer period than five years after the death of John Early - that the statute of limitations barred all of the claims except the claim against the estate of John Early's

remained in this five years after the death of John Early's death. We think this contention must be overruled. Early v. Early, 207 N. 11, 24, 41; Early v. Early, 20 N. 102, 103; Early v. Early, 20 N. 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

tion of being compensated by a devise in his father's will. The father being accidentally killed failed to make a will and it was held in a claim filed against the father's estate by the son that the Statute of Limitations being interposed, the son could only recover for the service he had rendered for the five years preceding the filing of his claim. In Miller v. Cinnamon, supra, it was held that where the Statute of Limitations was interposed as a defense in a suit on an oral contract to recover wages for services covering a long period for services limits the recovery to wages earned within five years prior to the beginning of the suit, in the absence of circumstances removing the statutory bar. That was an action of assumpsit. The declaration consisted of the common counts whereby plaintiffs sought to recover for services rendered from August 1, 1882 to March 30, 1892 at \$5.00 per week. The Statute of Limitations was interposed as a defense. The court there said (p.452) "The appellee was only entitled to recover for services rendered within five years prior to the date when the suit was brought. * * * Where one is employed under a general agreement which fixes no term of service, and continues in service a long time, the hiring will be treated as a hiring by the year; and, in case of such long continued employment, the statute will ordinarily bar a claim for all outside of the five years immediately before the commencement of the action, unless there is evidence to take it out of the operation of the statute." The court there refused to instruct the jury as to the law on the questions of the Statute of Limitations and this was held erroneous.

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...father's estate by the son ...
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In the instant case the plaintiff's services were rendered during a period of about thirteen years. Her contention is that she was to be paid not in wages but was to be given the farm after John Early's death, but that defense is based upon an express contract and the claim now advanced is that plaintiff is entitled to recover upon an implied contract, so that the claimed express contract is out of the case and cannot be considered. Wm. Butcher Steel Works v. Atkinson, 68 Ill. 481. Therefore the cases cited by counsel for plaintiff to the effect that the Statute of Limitations does not begin to run where the oral agreement provides that payment shall not be made until after the death of the one who owes wages are not applicable here. Of course, if Mrs. Pillsbury were basing her claim upon the oral agreement which she claimed was entered into between her and John Early whereby she was to receive the farm after his death the statute would not begin to run until after John Early's death, but as we have seen, plaintiff is contending that she is entitled to recover on account of an implied contract for the reasonable value of her services and the term of service having continued over a long period of years, the hiring will be treated as a hiring by the year and the Statute of Limitations is not tolled. The court should have limited the recovery as requested in the instruction to a period of five years preceding John Early's death.

We think there was no error in the refusal of the court to give other instructions requested by the defendant. Some of those refused were covered by others which were given. As to the refused instruction by which the defendant sought

It is further stated that Plaintiff's services were rendered during a period of about thirty years. Her contention is that she was in no way but was to be given the same after John's death, but that defendant is bound upon an express contract and the claim now advanced is that Plaintiff is entitled to recover upon an implied contract, so that the claimed express contract is out of the case and cannot be considered. See, Plaintiff's Exhibit A.

Plaintiff's Exhibit B. Therefore the action is by contract for Plaintiff to the effect that the contract of limitation does not begin to run when the oral agreement provides that payment shall not be made until after the death of the one who was to pay the same. Of course, it is true that Mrs. Williams was bound by the oral agreement which she obtained was entered into between her and John. Early, however, she was to receive the same after his death. The estate would not begin to run until after John's death, but as we have seen, Plaintiff is contending that she is entitled to recover on account of an implied contract for the reasonable value of her services and the term of service having continued over a long period of years, the fixing will be treated as a ruling by the jury and the contract of limitation is not valid. The court should have limited the recovery as requested in the instruction to a period of five years preceding John's death.

We think there was no error in the refusal of the court to give other instructions requested by the defendant. Some of these requests were covered by others which were given. As to the request in instruction by which the defendant sought

to have the jury told that if they believed from the evidence that shortly after the death of Early, plaintiff conferred with the administrator and other persons as to when she would move from the premises and further conferred with them relative to her claim for one-half of the livestock and other personal property, but did not then mention any indebtedness which she claimed John Early owed her, they should take such fact into consideration in determining whether there was anything due and owing plaintiff. We are of the opinion that this instruction was erroneous in singling out particular evidence. It was the duty of the jury to consider all of the evidence, and therefore the instruction was inaccurate. Nor was there any error in the action of the court in failing to give a requested instruction to the effect that they take into consideration in determining whether there was anything due plaintiff, the fact that John Early was in the habit of paying his bills promptly. It is not pointed out in the argument why this instruction was proper and a point not argued under our rules may be considered waived. But in any event the refusal to give this instruction ought not in our opinion cause a reversal of the judgment. We have considered all of the other contentions made by the defendant, but there was no substantial error except the refusal of the court to give the instruction relative to the Statute of Limitations.

The record discloses without contradiction that the services rendered by plaintiff were reasonably worth from \$25.00 to \$35.00 per week and the jury having found that she had not been paid, we think plaintiff was entitled to recover at least \$25.00 per week for five years. This would make

plaintiff entitled to \$8500.00 and if plaintiff will, within ten days remit \$1,000.00, the judgment will be affirmed for \$8500.00, otherwise the cause will be reversed and remanded. Litigation ought to end sometime and in view of what has occurred in this case, we think the judgment ought not be reversed and the case re-tried if plaintiff will remit the \$1,000.00 as above stated.

The fact that it appears from the evidence that plaintiff received some of the produce and livestock during the time she rendered the services, cannot be taken into consideration in fixing the amount due here because the value of such produce and livestock does not appear and what she received being in the nature of part payment, the burden of proving the value of the produce and livestock was upon the defendant.

If plaintiff files a remittitur, as above stated, the judgment for the balance of \$8500.00 will be affirmed, otherwise the cause will be reversed and remanded. The costs in this court will be taxed 85% to defendant and 15% to complainant.

AFFIRMED UPON REMITTITUR, OTHERWISE REVERSED AND REMANDED.

THOMPSON, J. AND TAYLOR, P.J. CONCUR.

11. Plaintiff will receive the \$1,000.00 as above stated.
The judgment shall not be reversed and the case re-tried.
And in view of what has occurred in this case, we think
proper and reasonable. Plaintiff ought to find satisfaction
with the above award. \$1,000.00, because the cause will be
settled for good and all. The judgment will be
affirmed as stated to \$1,000.00 and it is so ordered with
costs.

that the received being in the nature of a gift, the value of the product and live-
stock was not the subject of the gift.

the judgment for the balance of \$1000.00 with no interest, the balance of the same will be covered and repaid. The

SECRET

245 I.A. 817#2

194 - 31326

THE CARNEGIE COMPANY,

Appellee,

v.

WILLIAM S. TATE, ET AL

WILLIAM S. TATE,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Monday, June 13, 1927.

MR. JUSTICE O'CONNOR delivered the opinion
of the court.

On May 31, 1925, the Carnegie Company filed its petition against William S. Tate and others, seeking to foreclose a lien on property owned by Tate on account of work performed by the petitioner in the partial wrecking of a building for Tate for which he claimed \$1,000.00. Julius Floto an architect who had performed services in the matter, was made a party defendant and filed his answer, claiming a lien for the value of the services rendered by him. After the issues were made up, the cause was referred to a master in chancery who took the evidence and made his report, in which he found that the petitioner was entitled to a lien for \$1,000.00 and Floto was entitled to a lien for \$360.00. The master's report was approved by the chancellor and a decree entered in the usual form and Tate prosecutesthis appeal.

The evidence shows that the petitioner was a

1051 - 1053

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1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

Source: *Journal of the American Statistical Association*, 1997, 92, 1031-1042.

Opinion filed Monday, June 13, 1987.

Dr. Thomas J. Schwanke, Director, The National Center for Human Genome Research

• **PLANNING** 407

ON SALE 11/10/00

of salmon, trout, and steelhead.

It is possible to do it in many ways, but I will not do it.

Johnson, William, 1891-1900, 1901-1910, 1911-1920, 1921-1930, 1931-1940, 1941-1950, 1951-1960, 1961-1970, 1971-1980, 1981-1990, 1991-2000, 2001-2010, 2011-2020, 2021-2030, 2031-2040, 2041-2050, 2051-2060, 2061-2070, 2071-2080, 2081-2090, 2091-2100, 2101-2110, 2111-2120, 2121-2130, 2131-2140, 2141-2150, 2151-2160, 2161-2170, 2171-2180, 2181-2190, 2191-2200, 2201-2210, 2211-2220, 2221-2230, 2231-2240, 2241-2250, 2251-2260, 2261-2270, 2271-2280, 2281-2290, 2291-2300, 2301-2310, 2311-2320, 2321-2330, 2331-2340, 2341-2350, 2351-2360, 2361-2370, 2371-2380, 2381-2390, 2391-2400, 2401-2410, 2411-2420, 2421-2430, 2431-2440, 2441-2450, 2451-2460, 2461-2470, 2471-2480, 2481-2490, 2491-2500, 2501-2510, 2511-2520, 2521-2530, 2531-2540, 2541-2550, 2551-2560, 2561-2570, 2571-2580, 2581-2590, 2591-2600, 2601-2610, 2611-2620, 2621-2630, 2631-2640, 2641-2650, 2651-2660, 2661-2670, 2671-2680, 2681-2690, 2691-2700, 2701-2710, 2711-2720, 2721-2730, 2731-2740, 2741-2750, 2751-2760, 2761-2770, 2771-2780, 2781-2790, 2791-2800, 2801-2810, 2811-2820, 2821-2830, 2831-2840, 2841-2850, 2851-2860, 2861-2870, 2871-2880, 2881-2890, 2891-2900, 2901-2910, 2911-2920, 2921-2930, 2931-2940, 2941-2950, 2951-2960, 2961-2970, 2971-2980, 2981-2990, 2991-3000, 3001-3010, 3011-3020, 3021-3030, 3031-3040, 3041-3050, 3051-3060, 3061-3070, 3071-3080, 3081-3090, 3091-3100, 3101-3110, 3111-3120, 3121-3130, 3131-3140, 3141-3150, 3151-3160, 3161-3170, 3171-3180, 3181-3190, 3191-3200, 3201-3210, 3211-3220, 3221-3230, 3231-3240, 3241-3250, 3251-3260, 3261-3270, 3271-3280, 3281-3290, 3291-3300, 3301-3310, 3311-3320, 3321-3330, 3331-3340, 3341-3350, 3351-3360, 3361-3370, 3371-3380, 3381-3390, 3391-3400, 3401-3410, 3411-3420, 3421-3430, 3431-3440, 3441-3450, 3451-3460, 3461-3470, 3471-3480, 3481-3490, 3491-3500, 3501-3510, 3511-3520, 3521-3530, 3531-3540, 3541-3550, 3551-3560, 3561-3570, 3571-3580, 3581-3590, 3591-3600, 3601-3610, 3611-3620, 3621-3630, 3631-3640, 3641-3650, 3651-3660, 3661-3670, 3671-3680, 3681-3690, 3691-3700, 3701-3710, 3711-3720, 3721-3730, 3731-3740, 3741-3750, 3751-3760, 3761-3770, 3771-3780, 3781-3790, 3791-3800, 3801-3810, 3811-3820, 3821-3830, 3831-3840, 3841-3850, 3851-3860, 3861-3870, 3871-3880, 3881-3890, 3891-3900, 3901-3910, 3911-3920, 3921-3930, 3931-3940, 3941-3950, 3951-3960, 3961-3970, 3971-3980, 3981-3990, 3991-4000, 4001-4010, 4011-4020, 4021-4030, 4031-4040, 4041-4050, 4051-4060, 4061-4070, 4071-4080, 4081-4090, 4091-4100, 4101-4110, 4111-4120, 4121-4130, 4131-4140, 4141-4150, 4151-4160, 4161-4170, 4171-4180, 4181-4190, 4191-4200, 4201-4210, 4211-4220, 4221-4230, 4231-4240, 4241-4250, 4251-4260, 4261-4270, 4271-4280, 4281-4290, 4291-4300, 4301-4310, 4311-4320, 4321-4330, 4331-4340, 4341-4350, 4351-4360, 4361-4370, 4371-4380, 4381-4390, 4391-4400, 4401-4410, 4411-4420, 4421-4430, 4431-4440, 4441-4450, 4451-4460, 4461-4470, 4471-4480, 4481-4490, 4491-4500, 4501-4510, 4511-4520, 4521-4530, 4531-4540, 4541-4550, 4551-4560, 4561-4570, 4571-4580, 4581-4590, 4591-4600, 4601-4610, 4611-4620, 4621-4630, 4631-4640, 4641-4650, 4651-4660, 4661-4670, 4671-4680, 4681-4690, 4691-4700, 4701-4710, 4711-4720, 4721-4730, 4731-4740, 4741-4750, 4751-4760, 4761-4770, 4771-4780, 4781-4790, 4791-4800, 4801-4810, 4811-4820, 4821-4830, 4831-4840, 4841-4850, 4851-4860, 4861-4870, 4871-4880, 4881-4890, 4891-4900, 4901-4910, 4911-4920, 4921-4930, 4931-4940, 4941-4950, 4951-4960, 4961-4970, 4971-4980, 4981-4990, 4991-5000, 5001-5010, 5011-5020, 5021-5030, 5031-5040, 5041-5050, 5051-5060, 5061-5070, 5071-5080, 5081-5090, 5091-5100, 5101-5110, 5111-5120, 5121-5130, 5131-5140, 5141-5150, 5151-5160, 5161-5170, 5171-5180, 5181-5190, 5191-5200, 5201-5210, 5211-5220, 5221-5230, 5231-5240, 5241-5250, 5251-5260, 5261-5270, 5271-5280, 5281-5290, 5291-5300, 5301-5310, 5311-5320, 5321-5330, 5331-5340, 5341-5350, 5351-5360, 5361-5370, 5371-5380, 5381-5390, 5391-5400, 5401-5410, 5411-5420, 5421-5430, 5431-5440, 5441-5450, 5451-5460, 5461-5470, 5471-5480, 5481-5490, 5491-5500, 5501-5510, 5511-5520, 5521-5530, 5531-5540, 5541-5550, 5551-5560, 5561-5570, 5571-5580, 5581-5590, 5591-5600, 5601-561

of a building for the use of the Government.

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(continued)

• *Journal of the American Medical Association*, 2000; 284: 1039-1044

A few territories and parts were neglected and

corporation engaged in the construction and wrecking of buildings in Chicago and on November 10, 1934, it entered into a written contract with the defendant, Tate, for the wrecking of a building located at the southeast corner of Sangamon and Adams streets, Chicago. In addition to the wrecking of the building the contract provided that petitioner build a "closure wall" on the premises. The work to be done was shown by specifications and drawings of Julius Floto, the architect, and the contract provided that the work was to start at once and to proceed diligently until completed. The petitioner was to be paid \$1200.00 for the doing of the work. The evidence further shows that petitioner commenced the work about the first of November and continued until the 13th of December and that during that time he had performed about ten-twelfths of all the work called for by the contract and that \$1000.00 would be the reasonable compensation for the work done. The evidence further shows that petitioner did no work after the 13th of December, on account of the inclemency of the weather and that about December 24th, the defendant Tate requested the architect to see that no further work was done. This information was conveyed to complainant by the architect and no work was done thereafter. The evidence offered on behalf of the architect, Floto, was to the effect that he entered into an oral agreement with the defendant Tate, to draw plans and specifications for the work, one for the wrecking of the building and the other for the construction of the new building to be erected on the site of the old one; that

corporation engaged in the construction and erecting of
buildings in Chicago and on November 10, 1936, it entered
into a written contract with the defendant, Tapp, for the
erecting of a building located at the southeast corner
of Randolph and Adams streets, Chicago. In addition to
the erecting of the building the contract provided that
petitioner build a "dormer wall" on the premises. The
work to be done was shown by specifications and drawings
of John Tapp, the architect, and the contract pro-
vided that the work was to start at once and to proceed
thenceforth until completed. The petitioner was to be
paid \$1500.00 for the doing of the work. The evidence
further shows that petitioner commenced the work about
the first of November and continued until the 15th of
December and that during that time he had performed about
two-thirds of all the work called for by the contract
and that \$1000.00 would be the reasonable compensation
for the work done. The evidence further shows that
petitioner did not start the 15th of December, on
account of the inclemency of the weather and that about
December 24th, the defendant Tapp requested the plaintiff
to see that no further work was done. This instruction
was conveyed to completion by the plaintiff and no work
was done thereafter. The evidence offered on behalf of the
defendant, Tapp, was to the effect that he entered into
an oral agreement with the defendant Tapp, to erect a
dormer wall on the premises for the work, and for the erecting of
the building and the other two the construction of the new
building to be erected on the site of the old one; that

he was to be paid a reasonable compensation for the one and $3\frac{1}{2}$ per cent of the estimated cost of the building for the other in case the construction of the new building was abandoned by Tate, and that he was to receive 5 percent of the cost of the building if it was constructed and in that event he was to superintend the construction of the building. The defendant's evidence was to the effect that the petitioner, the Carnegie Company did not proceed expeditiously with the work and that Tate made complaint on this account from time to time. Tate's evidence further tended to show that the work was not properly done and discontinued by the petitioner of its own accord and that he did not order that the work be stopped. That he had not agreed to pay the architect a percentage of the estimated cost of the proposed building for making plans and specifications for that building, but that he would pay the architect for the actual time he spent in the preparation of the plans and specifications. The architect offered further evidence tending to show the reasonable value of the services rendered by him and the master found that the reasonable value of the architect's services for the work he had done in regard to the wrecking of the building was \$60.00 and for the other work - the preparation of plans and specifications for the new building - \$900.00. The evidence further tended to show that the petitioner had paid \$150.00 for necessary insurance and it was found that this sum, together with the work which it had performed was the value of \$1,000.00.

On the controverted questions of fact the finding was in favor of the petitioner and the architect and against

It was to be paid a reasonable compensation for the use
and 2) per cent of the estimated cost of the building
for the effort in case the construction of the new building
was abandoned by Tate, and that he was to receive 2 percent
of the cost of the building if it was constructed and in
that event he was to surrender the construction of
the building. The defendant's evidence was to the effect
that the petitioner, the Georgia Company did not proceed
actively with the work and that Tate made complaint
on this account from time to time. Tate's evidence further
tended to show that the work was not properly done and dis-
continued by the petitioner at its own request and that
he did not order that the work be stopped. That in fact
not agreed to pay the architect a percentage of the estimated
cost of the proposed building for making plans and specifications
there for that building, but that he would pay the architect
for the actual time he spent in the preparation of the plans
and specifications. The architect offered further evidence
tending to show the reasonable value of the services rendered
by him and the master found that the reasonable value of the
architect's services for the work he had done in regard to
the working of the building was \$25,000.00 and for the other
work - the preparation of plans and specifications for the
new building - \$500,000.00. The evidence further tended to show
that the petitioner had paid \$150,000.00 for necessary insurance
and it was found that this sum, together with the work which it
had performed was the value of \$1,000,000.00.

On the controverted question of fact the finding
was in favor of the petitioner and the architect and against

the defendant. Upon a careful consideration of all the evidence in the record, we are unable to say that such finding is against the manifest weight of the evidence and, therefore, under the law, we are not warranted in disturbing such findings.

As mechanics' liens are purely statutory and in derogation of the common law, a lien will be allowed only where the party claiming the lien complies strictly with the statute. Hoier v. Kaplan, 313 Ill. 448. The defendant contends that the petition filed by the Carnegie Company does not comply with the provisions of Sec. 11 of the Mechanic's Lien law and is, therefore, insufficient to sustain the decree. Sec. 11 provides that the petition "shall contain a brief statement of the contract or contracts on which it is founded, the date when made, and when completed, if not completed, why, and it shall also set forth the amount due and unpaid, a description of the premises which are subject to the lien, and such other facts as may be necessary to a full understanding of the rights of the parties." In support of the contention, it is argued that the petition fails to show (1) the date of the contract (2) a brief statement of the contract in that it fails to show the work that is to be done, the contract price or any of the terms and conditions of the contract, and (3) that it fails to give such other facts as are necessary to a full understanding of the rights of the parties, in that it fails to show the necessity for the architect's certificate issued by the architect to the petitioner; that it fails to show the value of the work done, or in what manner the petitioner was prevented

the defendant. When a material consideration of all the
evidence in the record, we are unable to say that such
finding is against the weight of the evidence
and, therefore, under the law, we are not warranted in
disregarding such finding.

As mentioned, there are highly material facts
in connection of the common law, a fact will be allowed
only where the party claiming the fact is able to
show the same. Miller v. Rogers, 211 Ill. 443. The
defendant contends that the petition filed by the plaintiff
complies with the provisions of Sec. 11
of the Mechanics' Lien law and is, therefore, immaterial
to maintain the decree. Sec. 11 provides that the petition
shall contain a brief statement of the contract or con-
tract on which it is founded, the date when made, and
other particulars, if not completed, why, and it shall also
set forth the amount due and unpaid, a description of the
premises which are subject to the lien, and such other
facts as may be necessary to a full understanding of the
rights of the parties. In support of the contention,
it is argued that the petition fails to show (1) the date
of the contract (2) a brief statement of the contract
it that it fails to show the work there to be done,
the contract price or any of the terms and conditions of
the contract, and (3) that it fails to give such other
facts as are necessary to a full understanding of the
rights of the parties, as that it fails to show the necessity
for the plaintiff's petition issued by the architect to
the defendant; that it fails to show the value of the
work done, or in what manner the plaintiff was prevented

from continuing work, when the work was stopped, or why the complainant is entitled to interest from March 2, 1925.

1. The contention that the petitioner fails to allege the date of the contract cannot be sustained because it is alleged in the petition that on the 10th of November, 1925, defendant applied to the petitioner to wreck a certain building located at the southeast corner of Sangamon and Adams streets, Chicago, including the building of a "closure wall" and that thereupon the petitioner and Tate entered into a written contract.

2. As to the contention that the petition fails to allege what work was to be done, the contract price and any of the terms and conditions, we are also of the opinion that the contention cannot be sustained. The petition shows that the work to be done was the wrecking of a building located at the southeast corner of Sangamon and Adams streets and the building of a "closure wall"; that petitioner diligently proceeded with the work called for by the contract, but was prevented from continuing it by the defendant and that petitioner had obtained from the architect a certificate certifying that the petitioner had completed work of the value of \$1,000.00. While the petition does not allege what the petitioner was to receive for doing the entire work, we think after decree it is sufficient, and we are also of the opinion that after decree the petition sufficiently shows the terms and conditions of the contract between the petitioner and Tate. It shows that the contract was made November 10th; that the petitioner diligently

from continuing work, when the work was stopped, or why the assignment is entitled to interest from March 2, 1928.

1. The contention that the petition fails to allege the date at the interest cannot be sustained because it is alleged in the petition that on the 10th of November, 1928, defendant applied to the petitioner to erect a certain building located at the southeast corner of Exchange and Adams streets, Chicago, including the building of a "classroom wall" and that between the petitioner and the defendant there is a written contract.

2. As to the contention that the petition fails to allege what was to be done, the defendant's answer is that the petition is not deficient, as the facts of the opinion show that the contention cannot be sustained. The petition shows that the work to be done was the erecting of a building located at the southeast corner of Exchange and Adams streets and the building of a "classroom wall"; that defendant allegedly proceeded with the work called for by the contract, but was prevented from continuing it by the defendant and that petitioner has charged that the defendant has committed a tort in carrying out the contract and that the petition has established the value of the value of \$1,000.00. While the petition does not allege what the petitioner was to receive for doing the above work, we think after having it in mind, and the fact that the opinion that it is correct the petition sufficiently shows the terms and conditions of the contract between the petitioner and defendant. It shows that the contract was made somewhere about 1928; that the petitioner allegedly

proceeded with the work, but was prevented from completing its construction by the defendant. We think, upon an examination of the entire record, it appears that the defendant understood all the necessary facts so that he could properly make his defense. If as the petitioner alleged and the evidence tends to show, the petitioner was prevented from completing the work by the defendant and the value of the work done was \$1,000.00, this was sufficient to warrant the issuance of an architect's certificate. Nor do we think there is merit in the contention that the petition fails to allege in what manner the petitioner was prevented from continuing the work. The petition alleges that petitioner was prevented from continuing the work by the defendant, and the evidence tended to show that petitioner was told not to do anything further after December 28th. These being the facts as the evidence tends to show and as found by the master and chancellor, we think plaintiff was entitled to interest after March 2, 1925, being the date on which the architect issued his certificate.

The petitioner after setting up the making of the contract of November 10, 1924, alleged that a copy of the contract was attached as an exhibit to the petition and made a part thereof. The defendant Tate, in his answer, denied that it was made a part of his petition and this is a fact. When the matter was on hearing before the master, the petitioner offered the contract in evidence, but it was objected to on the ground that a copy had not been attached to the petition as alleged. The objection was

presented with the same, but was prevented from submitting
its contents by the defendant. We think, upon an
examination of the matter, it appears that the
defendant understood all the necessary facts so that he
could properly make his defense. It is the petitioner's
allegation that the evidence tends to show, the petitioner
was prevented from presenting the facts by the defendant,
and the value of the same was \$1,000.00. This was
entitled to return the judgment of an arbitrator's
certificate. For as we think there is merit in the con-
tention that the position fails to allege in what manner
the petitioner was prevented from continuing the work.
The position alleges that defendant was prevented from
submitting the work by the defendant, and the evidence
tended to show that petitioner was not to be paid
being further after December 1925. There being the facts
as the evidence tends to show and as found by the master
and arbitrator, we think plaintiff was entitled to interest
after March 2, 1925, being the date on which the certificate
issued his certificate.

The petitioner after setting up the making of the
contract of November 15, 1924, alleged that a copy of the
contract was attached as an exhibit to the petition and
made a part thereof. The defendant says, in his answer,
denied that it was made a part of his petition and this is
a fact. When the matter was on hearing before the master,
the petitioner offered the contract in evidence, but it
was objected to on the ground that a copy had not been
attached to the petition as alleged. The objection was

overruled and the contract admitted and we think properly so. The uncontradicted evidence is that both parties signed the contract and the fact that it was or was not attached to the bill in no way affected its admission in evidence. The petitioner, however, contends that the allegations of the petition, taken in connection with the defendant's answer and the manner in which the cause was heard, all shows that the matter was heard on the theory that the contract was actually attached to the petition and considered as a part of it. We think this contention is not borne out by the record. There is no dispute but that the contract was executed by both parties, but it was not attached to the bill and cannot be taken into consideration in determining the sufficiency of the allegations of the petition. The allegations are rather meager and the petition might be subject to demurrer, but in view of the fact that issue was joined and the case heard, we think the petition is sufficient. It is a rule of law that after decree, all intendments are to be indulged in favor of the sufficiency of the pleading and the rule that all pleadings are to be construed most strictly against the pleader where tested by demurrer, does not obtain after the decree or verdict. 21 C.J. Sec. 425, p.405; Diamond Glue Co. v. Wietzychowski, 327 Ill. 338-349; 34 Cyc. 82; 4 Ency. Pl. & Pr. 782. In the section cited in Corpus Juris, supra, it is said: "Where a bill is not demurred to, after final decree, all fair intendments should be indulged in favor of the sufficiency of the pleading."

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to the bill in no way affected its admission in evidence.
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of the petition, taken in connection with the defendant's
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admitted as a part of it. We think this contention is
not borne out by the record. There is no dispute but that
the contract was executed by both parties, and it was not
attached to the bill and cannot be taken into consideration
in determining the sufficiency of the allegations of the
petition. The allegations are neither proper and the
petition might be subject to demurrer, but in view of the
fact that issue was joined and the case heard, we think
the petition is sufficient. It is a rule of law that after
demurrer, all allegations are to be taken in favor of
the sufficiency of the pleading and the rule that all pleadings
are to be construed most strictly against the pleader where
tested by demurrer, does not obtain after the decree or
verdict. 21 C. L. 428, 429; 21 C. L. 429, 430; 21 C. L. 430, 431.
21 C. L. 431, 432-433; 21 C. L. 433, 434; 21 C. L. 434, 435.
In the section cited in Brown v. Brown, supra,
it is said: "Where a bill is not demurred to, after trial
decree, all its allegations should be taken in favor of
the sufficiency of the pleading."

Complaint is also made to the admission in evidence, over defendant's objection, of a letter purporting to have been written by the defendant. The architect testified that he received the letter in question through the mail. It is addressed to him and is as follows: "This will serve notice that the contract between myself and The Carnegie Co. of Chicago is dissolved on account of their violation of Article 2, and they are to do no work on the buildings as this matter is now in the hands of my attorney. Yours, Wm. S. Tate." He further testified that, upon receipt of the letter, he notified the petitioner and that the latter acquiesced in the dissolution of the contract; that shortly thereafter he advised Tate that he had conveyed the information contained in the letter to the petitioner and the result of the conversation. There was another document introduced in evidence which bore the genuine signature of the defendant Tate and a witness who testified that he was an expert in hand writing, testified that they were written by the same person. Tate denied that he wrote the letter or that it was signed by him and his two sons also testified that the signature on the letter was not their father's. The original documents are not before us and we cannot say that the master was wrong in receiving the letter in evidence. Nor do we think the letter very material, because there was evidence tending to show that the architect had notified petitioner's representative of the receipt of this letter and that no further work should be done by the petitioner and that shortly thereafter he notified Tate of these facts, so that there was evidence tending to show that the Carnegie Company was told by the defendant Tate, not

Complaint is also made to the admission in evidence, over defendant's objection, of a letter purporting to have been written by the defendant. The witness testified that he received the letter in question through the mail. It is addressed to him and is as follows: "This will serve notice that the contract between myself and the State of Ohio is dissolved on account of their violation of Article 8, and they owe to me work on the building as this matter is now in the hands of my attorney. Yours, W. S. Tate." He further testified that, upon receipt of the letter, he notified the petitioner and that the letter was produced in the dissolution of the contract; that shortly thereafter he advised Tate that he had reviewed the information contained in the letter to the petitioner and the result of the investigation. There was another document introduced in evidence which was the genuine signature of the defendant Tate and a witness who testified that he was an expert in hand writing, testified that the letter was written by the same person. Tate denied that he wrote the letter or that it was signed by him and his two sons also testified that the signatures on the letter was not their father's. The original documents are not before us and we cannot say that the matter was wrong in receiving the letter in evidence. But do we think the letter very material, because there was evidence tending to show that the witnesses had notified petitioner representative of the receipt of this letter and that no further work should be done by the petitioner and that shortly thereafter he notified Tate of these facts, so that there was evidence tending to show that the Carnegie Company was told by the defendant Tate, not

to do any work after December 24th.

The defendant further contends that the decree is erroneous and should be reversed because it includes \$150.00 paid by the petitioner for insurance in connection with the work called for by the contract, and this item is not lienable under the statute. We think the item should not have been included in the decree, because the provisions for a lien must be found in the statute and not in the contract.

Hoier v. Kaplan, supra. In that case the court said (p.455) "Appellant urges that he took into consideration the items for public liability and workmen's compensation insurance in fixing the contract price. These items do not constitute either labor or material, nor can they be made one or the other by computing them as part of the wages paid or of the contract price. The lien is provided by statute and not by contract, and unless the statute, under the rule of strict construction, creates the lien none can be asserted or maintained.

A further point is made by the defendant, Tate that the architect is not entitled to a lien for the reason that in the architect's answer it was alleged that the contract entered into with the defendant, Tate, was implied, while the evidence showed that the contract was express and that this constitutes a fatal variance. We think there is no merit in this contention. The evidence showed without a dispute that an agreement had been entered into between these parties and the only dispute was as to what compensation the architect was to receive for his services. We

to do any work after December 31st. The defendant further contends that the device is erroneous and should be rejected because it includes \$150.00 paid by the plaintiff for insurance in connection with the work called for by the contract, and this item is not included under the statute. We think the item should not have been included in the decree, because the provisions for a lien must be found in the statute and not in the contract. Hester v. Lumber Co., in that case the court said (p. 125) "Appellant argues that he took into consideration the item for his liability and workman's compensation insurance in fixing the contract price. These items he not considered either labor or material, and that they be made one of the other by computing them as part of the wages paid or of the contract price. The lien is provided by statute and not by contract, and unless the statute, under the rule of strict construction, reserves the lien money can be asserted or retained."

Further point is made by the defendant, that that the agreement is not entitled to a lien for the reason that in the plaintiff's answer it was alleged that the contract entered into with the defendant, that, was implied, while the evidence shows that the contract was express and that this constituted a legal contract. We think that is no result in this connection. The evidence shows without a dispute that an agreement had been entered into between these parties and the only dispute was as to what compensation the plaintiff was to receive for his services. We

think the point is trivial and of no importance. The defendant, Tate, however, contends that the architect was entitled to no lien, because, as we understand the argument, it appears from the record that the services performed by the architect were not rendered for the improvement of the property of the defendant, Tate, but that the services were merely for the purpose of advising Tate of the character of a building so that he might negotiate a loan on the property in case he afterwards decided to build. We think this contention is not borne out by the evidence, because it appears that Tate intended to construct a building on the premises in question and the architect having rendered services, he was entitled to a lien.

Freeman v. Kinaker, 185 Ill. 173. The facts in the instant case, in this respect, are dissimilar to those involved in the case of Ohrenstein, et al v. Howell, 227 Ill. App. 315. The court there said, "the services rendered by the architect were for the purpose of furnishing the defendant with information tending to show the possibilities of such an improvement." We think the finding of the master that the plans and specifications were prepared by Floto for improvements then intended by Tate is borne out by the record.

For the error in including the \$150.00 above mentioned, the decree of the Circuit Court is reversed and the cause remanded, with directions to eliminate this item from the decree.

The costs in this court are to be taxed fifteen percent to the petitioner, The Carnegie Company and eighty-

think the point is trivial and of no importance. The defendant, later, however, contended that the evidence was entitled to no less, because, as we have stated the evidence, it appears from the record that the evidence submitted by the architect was not returned for the improvement of the property of the defendant, but that the services were merely for the purpose of advising him of the character of a building as that he might negotiate a loan on the property in case he afterwards decided to build. We think this contention is not borne out by the evidence, because it appears that the architect intended to construct a building on the premises in question and the architect having rendered services, he was entitled to a loan. *Proctor v. Rinker*, 122 Ill. 178. The facts in the instant case, in this respect, are analogous to those involved in the case of *Proctor v. Rinker*. 122 Ill. 178. The court there said, "the services rendered by the architect were for the purpose of furnishing the defendant with information leading to show the possibilities of such an improvement." We think the finding of fact that the plans and specifications were prepared by the architect for the improvement then intended to be made was in error. For the error in including the \$150.00 above mentioned, the decree of the circuit court is reversed and the cause remanded, with directions to substitute this sum for the above.

THE COURT IN THIS CASE ARE TO BE THUMB THUMB DOWN BY THE PETITIONER, THE PETITIONER COMPANY AND EIGHTY-

-11-

five percent to the defendant, Tate.

REVERSED AND REMANDED WITH DIRECTIONS.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

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206 - 31338

NORTH AMERICAN UNION, A FRATERNAL
BENEFICIARY SOCIETY,

Appellant,

v.

CENTRAL FURNITURE PACKING CO.,
a corp.,

Appellee.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

Opinion filed Monday, June 13, 1927.

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

By this appeal plaintiff seeks to reverse an
order of the Municipal Court of Chicago vacating a default
judgment entered June 4, 1926 in favor of the plaintiff and
against the defendant and permitting the defendant to
defend.

The record discloses that on May 7th, 1926,
plaintiff brought an action of replevin against the defend-
ant to recover possession of certain personal property,
a writ of replevin was issued and served the same day on
the defendant, but the property was not taken on the writ.
Afterwards the writ was again served on the defendant on
May 13th and on June 4th following the cause came on for
hearing, the defendant being absent and not represented, the
court found the issues in favor of the plaintiff and fixed
the damages at \$1,000.00. On August 13th defendant filed
a petition under Sec. 21 of the Municipal Court Act, praying
that the judgment be vacated and set aside and for leave
to defend. Plaintiff filed an answer to the petition and

245 I.A. 617

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APPELLANT

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OFFICE OF THE CLERK OF THE COURT

CHICAGO, ILL.

Opinion filed Monday, June 15, 1937.

MR. JUSTICE BREWER delivered the opinion of

the court.

By this appeal plaintiff seeks to reverse an order of the Municipal Court of Chicago vacating a judgment entered June 2, 1936 in favor of the plaintiff and against the defendant and permitting the defendant to defend.

The record discloses that on May 27, 1936, plaintiff brought an action of replevin against the defendant to recover possession of certain personal property. A writ of replevin was issued and served the same day on the defendant, but the property was not taken on the writ. Afterwards the writ was again served on the defendant on May 15th and on June 4th following the same came on for hearing, the defendant being absent and not represented, the court found the issues in favor of the plaintiff and fixed the damages at \$1,000.00. On August 18th defendant filed a petition under Sec. 51 of the Municipal Court Act, praying that the judgment be vacated and set aside and for leave to defend. Plaintiff filed an answer to the petition and

the matter was heard, evidence was introduced, the court granted the motion, vacated the judgment and plaintiff appeals.

It appears from the record that plaintiff employed the defendant to move certain personal property and that the defendant did the work beginning on the evening of April 30th and finishing about 5:30 o'clock on the morning of May 1st; that the charges of the defendant for the moving were \$339.45. When the work was completed, apparently no one was present, on behalf of the plaintiff, who could pay the bill and the defendant retained part of the personal property, claiming it had a lien for the payment of its bill. On May 4th the defendant returned part of the property it had retained and the balance was returned on May 11th, on which date plaintiff paid the defendant the \$339.45. Four days prior plaintiff had brought action of replevin against the defendant. It further appears from the evidence that the defendant, on April 11th when it returned the balance of plaintiff's property and received payment of its bill, thought all matters were then adjusted between the parties and paid no attention to the service of the summons, which was had upon it on May 7th and again on May 13th. The evidence is conflicting as to what took place on May 11th when the balance of the property was returned and the money paid as above stated.

The evidence further tends to show that the defendant first learned that the judgment had been entered

the matter was heard, evidence was introduced, the court
rendered its verdict, and the judgment was entered.
appeals.

It appears from the record that plaintiff
employed the defendant to take certain personal property
and that the defendant did the same beginning on the
evening of April 20th and finishing about 2:30 a.m. April
on the morning of May 1st; that the charges of the defendant
and for the money were \$200.00. When the work was com-
pleted, apparently no one was present, on behalf of the
plaintiff, who could pay the bill and the defendant re-
turned part of the personal property, claiming it had a
lien for the payment of the bill. On May 4th the defend-
ant returned part of the property it had retained and the
balance was returned on May 11th, on which date plaintiff
paid the defendant the \$200.00. Four days prior plaintiff
had brought action of replevin against the defendant. It
further appears from the evidence that the defendant on
April 11th when it returned the balance of plaintiff's
property and received payment of its bill, brought all
matters were then adjusted between the parties and paid no
attention to the service of the summons, which was had
upon it on May 7th and again on May 12th. The evidence
is conflicting as to what took place on May 11th when the
balance of the property was returned and the money paid
as above stated.

The evidence further tends to show that the
defendant first learned that the judgment had been entered

against it in July when an execution was served upon it. It was sometime after execution was served that it made its motion to vacate the judgment and the delay during this period of time was explained by the fact that counsel for the defendant was unable to proceed earlier. The evidence offered on behalf of the defendant also tended to show that it had a meritorious defense, at least a sufficient showing was made to authorize the court to vacate the judgment and permit the defendant to defend on the merits, and we are further of the opinion that we would not be warranted in holding that the defendant was guilty of negligence in failing to interpose a defense under the facts as disclosed by the evidence.

Under the provisions of Sec. 21 of the Municipal Court Act the court had jurisdiction to vacate the judgment, although more than thirty days had elapsed prior to the making of the motion and the order vacating the judgment is appealable. Gramer v. Commercial Men's Assn., 260 Ill. 516; Central Bond Co. v. Rosser, 323 Ill. 90.

The order of the Municipal Court of Chicago is affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

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215 - 31347

CLAIR BALFOUR AND FREDERICK SMYE,
doing business as BALFOUR, SMYE & CO.,

Appellee,

v.

SARAH E. COYNE,

Appellant.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

Opinion filed Monday, June 13, 1927.

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

Plaintiff brought an action against the defendant
on four promissory notes and for groceries sold to the
defendant, claiming a balance of \$452.26, together with
certain claimed interest due thereon. There was a trial
before the court without a jury and a finding and judgment
in plaintiff's favor of \$408.30, and the defendant appeals.

The record discloses that plaintiffs were engaged
in selling groceries at wholesale at Hamilton, Canada and
that the defendant conducted a retail grocery store in that
city and (from time to time) bought her supplies from plain-
tiffs. She seems to have given plaintiffs her notes from
time to time as evidence of the amount which she owed them.
In 1921 she sold out her business and came to Chicago.
At that time she made certain payments to plaintiffs and
turned over to them for collection certain bills which she
held for groceries she had sold to her customers. Plaintiffs
collected some \$58.00 on these accounts and applied it to the
indebtedness due and owing to them from the defendant. In

CLASS, BUREAU AND EXHIBIT NO.

Appellee,

Appellant.

Opinion filed Monday, June 18, 1937.

MR. JUSTICE BRIDGES delivered the opinion of the court.

Plaintiff brought an action against the defendant for the recovery of money and for damages and for the defendant's failure to deliver a certain quantity of goods to the plaintiff.

The facts of the case are as follows: Plaintiff is a merchant who deals in goods of various kinds. Defendant is a merchant who deals in goods of various kinds. Plaintiff and Defendant entered into a contract whereby Defendant agreed to deliver to Plaintiff a certain quantity of goods of various kinds. Plaintiff paid to Defendant the price of the goods. Defendant failed to deliver the goods to Plaintiff. Plaintiff brought this action against Defendant for the recovery of the money paid to Defendant and for damages and for the defendant's failure to deliver the goods to the plaintiff.

The court found that the contract between Plaintiff and Defendant was valid and enforceable. The court found that Defendant failed to deliver the goods to Plaintiff. The court found that Plaintiff paid to Defendant the price of the goods. The court found that Defendant failed to deliver the goods to Plaintiff. The court found that Plaintiff brought this action against Defendant for the recovery of the money paid to Defendant and for damages and for the defendant's failure to deliver the goods to the plaintiff.

The court granted judgment for Plaintiff for the recovery of the money paid to Defendant and for damages and for the defendant's failure to deliver the goods to the plaintiff.

1921 she executed her four promissory notes payable to plaintiffs on which the suit was brought. These notes were renewals of other notes she had given to plaintiffs. Plaintiffs offered evidence to the effect that they had forwarded the four notes to a concern in Los Angeles, California for collection and that they had not been returned, could not be found, and were still due and unpaid. The defendant's contention was, as we understand it, that she had paid her entire indebtedness to plaintiffs by turning over to them certain accounts which she held against some of her customers when she sold out her business in Hamilton, Canada and came to Chicago. On the other hand, plaintiffs' position was that these accounts were turned over to them for collection and they were to apply the amount collected on the defendant's indebtedness and this was done leaving a balance for which they brought suit.

The defendant contends that the judgment is wrong and should be reversed because plaintiffs failed to make out a case on the four notes sued upon because the evidence fails to show that the notes were lost and further fails to show that plaintiffs had made diligent search for them. The evidence on this phase of the case is not satisfactory or entirely clear, but we think it appears that plaintiffs sent the notes for collection to an agency in Los Angeles, California and that the notes were not returned, the agency contending that it had not received them from plaintiffs. Plaintiffs also offered evidence showing that the amount they claimed was still due and unpaid as an open account. No objection was made in the

that she executed her own promissory notes payable to Plaintiff on which she said was brought. These notes were remains of other notes that were in Plaintiff's possession and were in the effect that they had been returned to a company in Los Angeles, California for collection and that they had not been returned, could not be found, and were still due and unpaid. Plaintiff's contention was, as we understand it, that she had paid her entire indebtedness to Plaintiff by turning over to them certain accounts which she held against some of her customers when she sold out her business in Hamilton, Kansas and came to Chicago. Of the other hand, Plaintiff's position was that these accounts were turned over to them for collection and they were to apply the amount collected on the defendant's indebtedness and this was done leaving a balance for which they brought suit.

The court in its opinion that the judgment is wrong and should be reversed because Plaintiff failed to make out a case on the four notes and upon because the evidence fails to show that the notes were lost and further fails to show that Plaintiff had made diligent search for them. The evidence on this phase of the case is not sufficient to entirely clear, but we think it appears that Plaintiff want the notes for collection as an agency in Los Angeles, California and that the notes were not returned, the agency contending that it had not received them from Plaintiff. Plaintiff also offered evidence showing that the amount they claimed was still due and unpaid on an open account. No objection was made in the



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trial court, nor is there any objection in this court that such evidence was inadmissible because not within plaintiffs' statement of claim, and we are, therefore, of the opinion that the judgment must be sustained not only on account of evidence in regard to the notes being lost, but also on the further ground that the evidence was sufficient to warrant the finding and judgment based upon the fact that plaintiff had sold the defendant groceries which had not been paid for in full.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

[illegible]

Special Agent in Charge, Federal Bureau of Investigation

• **Stress** is a response to a stimulus that is perceived as a threat or challenge.

245 I.A. 617

228 - 31380

EDWARD T. LEONARD, et al.

Appellees.

v.

THOMAS E. HAYES, et al.,

MARIA CERUTI, et al.

Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Monday, June 13, 1927.

MR. JUSTICE O'CONNOR delivered the opinion
of the court.

Complainants, real estate brokers, filed their bill in the nature of a bill of interpleader, wherein they alleged that they were licensed real estate brokers and on March 31, 1925, were employed by Maria Ceruti and her husband to sell a certain piece of real estate located in Hubbard Woods, Illinois and agreed to pay complainants for their services three percent of the amount for which the property was sold; that they obtained Thomas A. Hayes and his wife as purchasers, who entered into a written contract with the Cerutis for the purchase of the premises mentioned; that the Hayeses had paid \$1,000.00 earnest money upon the execution of the contract; that the deal was not consummated; that the Cerutis claimed the \$1,000.00 earnest money and brought suit against the complainant in the County Court to recover it; that the Hayeses claimed that the Cerutis refused to consummate the sale of the premises and they demanded a return of their \$1,000.00 and had brought suit against complainants in the Circuit Court seeking to re-

245 L.A. 615

Page - 1128

EMERSON T. LARSON, et al.,
Appellants,

VERSUS
THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondents.

FILED FOR APPEAL, et al.

Appellants.

Opinion filed Monday, June 18, 1937.

MR. JUSTICE O'CONNOR delivered the opinion.

of the court.

Respondents, well known persons, filed their

bill in the nature of a bill of interpleader, wherein they

alleged that they were interested in certain property and an

amount of \$1,000.00, were entitled to same under and by virtue

of a certain deed of trust which was located in the

San Joaquin County, California and agreed to pay respondents the

amount of \$1,000.00 out of the proceeds of the sale of the property

and that they obtained from the respondents a certain deed of

trust in return for which they obtained from the respondents a

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cover it.

Complainants tendered the \$1,000.00 in court and prayed that the defendants be required to interplead, that the suits in the County and Circuit Courts be enjoined; that complainants be given \$750.00, being three percent of \$25,000.00, the price mentioned in the written contract for which the property was to be sold, out of the \$1,000.00. The Hayeses answered and admitted the execution of the contract but claimed that the Gerutis had refused to consummate the sale and demanded the return of the \$1,000.00. The Gerutis also answered and claimed that the Hayeses refused to carry out the purchase of the real estate and that they were entitled under the terms of the written contract, to the \$1,000.00.

Afterwards, on motion of complainants, an order was entered enjoining the prosecution of the two suits in the Municipal Court as prayed for and it was further ordered that complainants deposit the \$1,000.00 with the clerk of the court, which was accordingly done. Thereafter the cause came on to be heard before the chancellor and after a hearing a decree was entered finding that the Gerutis had failed to carry out the contract; that the complainants were entitled to a commission of \$750.00; that the \$1,000.00 be returned to the Hayeses and it was decreed that the Gerutis pay the complainants \$750.00. To reverse this decree the Gerutis prosecute this appeal.

The evidence tends to show that complainants, real estate brokers, were employed by Mrs. Gerutis, who owned the property in question to sell it for her, and that

over it.

Complainant tendered the \$1,000.00 in court and prayed that the defendant be required to interplead, that the sale in the County and Circuit Courts be enjoined; that complainant be given \$750.00, being three percent of \$25,000.00, the price mentioned in the written contract for which the property was to be sold, out of the \$1,000.00. The defendant answered and admitted the execution of the contract but claimed that the contract had returned to complainant the sale and demanded the return of the \$1,000.00. The defendant also answered and claimed that the property returned to carry out the purchase of the real estate and that they were entitled under the terms of the written contract, to the \$1,000.00.

Wherefore, on motion of complainant, an order was entered enjoining the prosecution of the two suits in the Circuit Court as prayed for and it was further ordered that complainant deposit the \$1,000.00 with the clerk of the court, which was accordingly done. Thereafter the cause came on to be heard before the court and after a hearing a decree was entered finding that the contract was valid in carry out the contract that the complainant were entitled to a commission of \$750.00; that the \$1,000.00 be returned to the defendant and it was decreed that the contract be the complainant \$750.00. To reverse this decree the Circuit Court granted this appeal.

The evidence tends to show that complainant, who had certain business, were employed by Mrs. Corrie, who owned the property in question to sell it for her, and that

she agreed to pay them a commission of three percent on the selling price for their services; that on March 31, 1925, the complainants, brokers, prepared a written contract whereby the Gerutis agreed to sell and the Hayeses agreed to buy the property for \$25,000.00. It recites that the Hayeses had paid \$1,000.00 earnest money to the complainants and agreed to pay \$11,000.00 more upon the property being conveyed to them; that the balance of \$13,000.00 be paid in installments of \$200.00, each six months. The contract then provided that "The above contract will be subject to a first mortgage not to exceed Ten Thousand Dollars (\$10,000.00) and to be placed by the purchaser at his own expense." The balance of the contract is the ordinary form providing for abstract of title or a guaranty policy, and the further usual provisions that in case the Hayeses refused to consummate the deal the brokers should pay the Gerutis any expenses they had been put to in the matter, retaining three percent commissions and rendering the over-plus to the Gerutis. The evidence further shows that shortly after the execution of the contract the brokers and the Hayeses went to a bank in Winnetka for the purpose of borrowing the \$10,000.00 mentioned in the provision above quoted from the contract; that the bank was willing to loan the \$10,000.00 on the property but in view of the provisions of the contract it refused to do so. It further appears that shortly after the execution of the contract questions arose between the parties as to the meaning of the contract and they were unable to reach an agreement on this question. On April 13, 1925 the parties came together and agreed upon an interpretation or a modification of the contract and to

the agent to pay them a commission of three percent on the
selling price for their services; that on March 21, 1922,
the said agent, however, proposed a written contract
whereby the Grinnell agent to sell and the Grinnell agent
to buy the property for \$22,000.00. It was then that the
Grinnell agent paid \$1,000.00 earnest money to the commission
and agreed to pay \$11,000.00 more upon the property being
conveyed to them; that the balance of \$11,000.00 he paid
in installments of \$500.00 each all months. The contract
then provided that "the above contract will be subject
to a first mortgage not to exceed two thousand dollars
(\$2,000.00) and so in case of the purchase of the
said property, the balance of the contract is the said
part form providing for payment of \$11,000.00 as a security
policy, and the Grinnell agent provided that in case the
Grinnell agent to execute the deed the Grinnell agent pay
the Grinnell agent expenses they had been put to in the matter,
including three percent commission and recording the same
upon to the Grinnell agent. The witness further states that shortly
after the execution of the contract the Grinnell agent and the
Grinnell agent went to a bank in Lincoln for the purpose of borrow-
ing the \$12,000.00 mentioned in the provision above stated
from the contract; that the bank was willing to loan the
\$12,000.00 on the property but in view of the provision
of the contract it refused to do so. It further appears that
shortly after the execution of the contract questions arose
between the parties as to the meaning of the contract and
they were unable to reach an agreement on this question.
On April 12, 1922 the parties went together and agreed upon
an interpretation as a modification of the contract and so

express the same, the following was written on the back of the contract:

"It is agreed the aforementioned first trust deed of \$10,000.00 to be placed upon said premises by purchaser is to be a part of and to be deducted from the aforementioned first payment of \$12,000.00 herein agreed upon. There is at present a first trust deed of approximately \$3,000.00 on said premises which purchaser is authorized and directed to pay and deduct from said \$10,000.00 trust deed made by purchaser. It is further agreed that sellers have the privilege of removing everything from said premises except main building, and all appurtenances thereto and also garage.

Seal

Seal

Witness:

Mrs. Ceruti was uneducated, could not read or write the English language, and she refused to sign the above interpretation or modification without the advice of Clark T. Northup, a police magistrate of Winnetka, and since he was not present it was never signed by either of the parties. Afterwards on April 30, 1925, the Chicago Title & Trust Co. rendered its opinion of title. This showed, among other things, that there was a first mortgage on the property of \$4500.00, which incumbrance was due five years after December 10, 1919. On May 18th following, Thomas A. Hayes, one of the purchasers of the property wrote Mrs. Ceruti a letter in which he advised her that he had examined the opinion of title, noted the \$4500.00 incumbrance, and continuing said "This title is not in accordance with our contract made and dated March 31, 1925. I, therefore, name this as objection number one (1) to your title as

...the following was written on the back of the
envelope.

"It is agreed that the assignment of the first
mortgage to the first mortgagee shall be
by assignment in a deed to be delivered
from the assignor to the assignee of the first
mortgage. There is to be a deed of assignment
of the first mortgage to the first mortgagee
and a deed of assignment of the second mortgage
to the second mortgagee. It is further agreed that
before any deed of assignment of the first mortgage
is made, the assignor shall deliver to the assignee
a deed of assignment of the second mortgage to the
second mortgagee. This is to be done before the
deed of assignment of the first mortgage is made.

Witness my hand and seal this 1st day of
January, 1910.

Assignor

...the following was written on the back of the
envelope.

"It is agreed that the assignment of the first
mortgage to the first mortgagee shall be
by assignment in a deed to be delivered
from the assignor to the assignee of the first
mortgage. There is to be a deed of assignment
of the first mortgage to the first mortgagee
and a deed of assignment of the second mortgage
to the second mortgagee. It is further agreed that
before any deed of assignment of the first mortgage
is made, the assignor shall deliver to the assignee
a deed of assignment of the second mortgage to the
second mortgagee. This is to be done before the
deed of assignment of the first mortgage is made.

presented to date and consequently refuse to consummate contract." On July 18th he wrote the Cerutis another letter calling attention to his letter of May 18th and stated that since sixty days had elapsed since his former letter and he had not been advised that the objection had been overcome, he considered the contract null and void.

The evidence further showed that on June 11 the Cerutis incumbered the property for \$2,000.00. On July 9th they made a further incumbrance of \$1500.00. Afterwards both parties demanded the \$1,000.00 from complainants and brought the suits above referred to in the Municipal Court.

Hayes testified that he made no effort to borrow the \$10,000.00 mentioned in the contract, but upon a consideration of the entire record we think it appears that Hayes did try to borrow the \$10,000.00 but was unable to raise it, apparently for the reason that the bank was dissatisfied with the terms of the contract entered into between the Hayeses and Cerutis. Northup, who was advising Mrs. Ceruti, took the position, and so testified, that the Hayes could not incumber the property for the \$10,000.00 until the deal was consummated. The evidence further shows that the Hayeses endeavored to have Mrs. Ceruti place an incumbrance upon the property of \$10,000.00 but that she refused to do so. From the briefs filed on behalf of the Hayeses and the Cerutis in this court and upon the oral argument it appears that within a few days after the contract was executed the parties disagreed as to the meaning of its provisions.

Hayes testified that shortly after the contract was

made the complainant, Leonard, called him up and said that Mrs. Ceruti was at his office and requested Hayes to come there also; that they met and there was a discussion about the interpretation of the contract; that the parties wanted to clear it up so that both could understand it. He further testified that after he went to Northup's office with Leonard in regard to the contract, that Leonard showed the contract to Meyers, the banker, and asked for a loan of \$10,000.00; that the banker stated he would be willing to make the loan on the property but on account of the provisions of the contract he would not do it. Northup testified that after the parties had gone over the matter several times they were unable to agree as to the meaning of the contract. The evidence further shows that shortly after the contract was signed Hayes learned of the \$4500.00 mortgage on the property. Counsel for the Hayeses in speaking of the contract being drawn by one unskilled in the law say, "As is apt to be the case with such instruments, the ink was hardly dry on the paper before its ambiguities furnished fruitful ground for discussion and bickerings. The clause which apparently caused the most discussion provided that

"The above contract will be subject to a first mortgage not to exceed \$10,000.00 and to be placed by purchasers at his own expense."

and then refers to this as the "trouble-making clause" and counsel for the Cerutis in discussing the same clause says "We wondered in the court below and wonder now what explanation he made of the foregoing clause of the contract". A great deal more is said to the same effect and we think all of it is warranted.

made the complaint, Leonard, called him up and said that
Mr. Gould was at his office and requested him to come
there also; that they sat and there was a discussion about
the interpretation of the contract; that the parties wanted
to clear it up so that both would understand it. He further
testified that after he went to Newburg's office with

Leonard in regard to the contract, that Leonard showed
the contract to him, the contract, and asked for a loan
of \$10,000.00; that the banker stated he would be willing
to make the loan on the property but on account of the
provisions of the contract he could not do it. Newburg
testified that after the parties sat down over the matter
several times they were unable to agree on the meaning
of the contract. The witness further stated that shortly
after the contract was signed Newburg loaned of the \$10,000.00
mortgage on the property. Leonard for the purpose in operating
of the contract being given by me mentioned in the law way.
"As it is not in the case with such instruments, the law was
hardly any on the paper before the registration completed
firstly ground for discussion and discussion. The clause
which apparently covered the most discussion provided that

"The above contract will be subject to a third
mortgage not to exceed \$10,000.00 and to be placed by
certificate of title and insurance."

and then refers to this as the "trouble-making clause" and
contact for the parties in discussing the same clause says
"We mentioned in the court below and wonder how that opera-
tion be made of the foregoing clause of the contract. A
great deal more is said to the same effect and we think
all of it is irrelevant."

Upon a careful consideration of all the evidence in the record, we are of the opinion that the deal was never consummated on account of the phraseology and wording of the contract. Hayes tried to borrow the \$10,000.00, but the banker, as he read the contract, refused to loan the money, although the evidence shows that the banker would have been willing to make the loan except for the wording of the contract and that when Hayes could not obtain the money, he refused to go through with the deal as is evidenced by his letter of May 18th above quoted. But we are also of the opinion that the Cerutis are not in a position to complain because the evidence fails to show that they could have delivered a good title. There was an incumbrance upon the property of \$4500.00 and there is no evidence tending to show that Cerutis could produce the note, trust deed and a release deed. There is no evidence in the record on this point at all. So that the Cerutis are in no position to claim the \$1,000.00 under the contract.

The complainants predicated their claim for commissions upon the fact that they procured the Hayeses and the Cerutis to enter into an enforceable contract for the sale and purchase of the real estate. The evidence shows that Leonard, one of the complainants, after the execution of the contract had a number of conferences with the parties and with the banker and that there was a continual discussion as to the meaning of the contract. We think that the contract was badly drawn, is self-evident. But, in any event, the practical effect of the matter was that on account of its phraseology, the deal fell through and in these circumstances,

[illegible]

we think complainants are not entitled to be paid a commission. We are of the opinion, however, that the bill was properly filed and that the court properly enjoined the prosecution of the two suits. ~~In the instant case~~ Complainants did not have an adequate remedy at law. They were defending two suits in the Municipal Court, in each of which the parties claimed the \$1,000.00 in question. In these circumstances the bill in question would afford complete and adequate relief. Noble v. Carruthers, 235 Ill. App. 1. We are also of the opinion that if complainants were entitled to a commission under the evidence, it could be obtained in the instant case. Heath v. Hurless, 73 Ill. 323; Foerster v. Enzenbacher, 178 Ill. App. 551.

For the reasons stated the decree of the Superior Court of Cook County is reversed and the cause remanded with instructions to enter a decree perpetually enjoining the prosecution of the County and ^{circuit} Courts ~~Circuit~~/suits and that it contain other provisions in accordance with the views herein expressed. Each of the three parties will be required to pay one-third of the costs incurred in this court.

REVERSED AND REMANDED WITH DIRECTIONS.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

no such complaint was not entitled to be paid a sum-
mation. We are of the opinion, however, that the bill
was properly filed and that the court properly enjoined
the prosecution of the two suits. In the case of the
Complaints did not have an adequate remedy at law. They
were detained two suits in the judicial court, in each of
which the parties claimed the right to be heard. In
these circumstances the bill in question would afford com-
pact and adequate relief. Smith v. Smith, 111 Ill. App. 1.
We are also of the opinion that if complaints were
entitled to a summons in such cases, it would be
entitled in the instant case. Smith v. Smith, 111 Ill. App. 1.
Smith v. Smith, 111 Ill. App. 1.

For the reasons stated the decree of the Superior
Court of Cook County is reversed and the cause remanded with
instructions to enter a decree perpetually enjoining the pro-
secution of the County and City and that it contain
other provisions in accordance with the view herein ex-
pressed. Each of the three parties will be required to
pay one-third of the costs incurred in this cause.

IT IS ORDERED AND DECREED BY THE COURT THAT
the decree of the Superior Court of Cook County be
reversed and the cause remanded with instructions to
enter a decree perpetually enjoining the prosecution of
the County and City and that it contain other provisions
in accordance with the view herein expressed. Each of the
three parties will be required to pay one-third of the
costs incurred in this cause.

237 - 31369

245 I.A. 618^{#1}

J. L. STIFEL & SONS,

Appellee,

v.

B. M. SHAFFNER,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Monday June 13, 1927.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action against the defendant on a written guaranty. There was a verdict and judgment in plaintiff's favor for \$3136.67 and the defendant appeals.

The record discloses that plaintiff was engaged in merchandising in West Virginia, selling merchandise through Jenkins-Kreer & Co., its agents in Chicago; that C. B. Shaffner, a man about fifty years of age and who was the son of the defendant, was engaged in business at Monticello, Ind., desired to purchase some of plaintiff's goods on credit and apparently the matter was taken up with Jenkins-Kreer & Co. by the defendant for the purpose of his son obtaining credit from the plaintiff and that, thereafter plaintiff executed the following written guarantee:

"Chicago, July 22, 1926.

For and in consideration of one dollar to me in hand paid and further for the purpose of obtaining credit by C. B. Shaffner, operating as the Attire Mfg. Co., I, B. M. Shaffner, hereby guarantee to J. L. Stifel & Sons, the payment of all accounts for goods sold to C. B. Shaffner, operating as the

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J. L. RYAN & SONS

Opinion filed Monday June 13, 1937.

MR. JUSTICE ROBERTS delivered the opinion of the court.

The plaintiff brought an action against the defendant for a return of a writ of habeas corpus and for a writ of mandamus to compel the defendant to issue the writ.

The plaintiff is a corporation organized under the laws of the State of New York. It is engaged in the business of operating a system of public utility. The defendant is a corporation organized under the laws of the State of New York. It is engaged in the business of operating a system of public utility. The plaintiff brought this action against the defendant for a return of a writ of habeas corpus and for a writ of mandamus to compel the defendant to issue the writ.

"CHANCERY, July 17, 1930."

For and in consideration of one dollar to me in hand paid by the defendant for the purpose of obtaining a writ of habeas corpus, I, the undersigned, do hereby certify that the defendant is entitled to the writ.

Attire Mfg. Co.

(signed) E. H. Shaffner.

Witness:

(signed) W. H. Tentes."

On July 28, July 31 and August 3, 1920, plaintiff sold and delivered to G. B. Shaffner at Monticello, Indiana goods of the value of \$4478.59, on which sum plaintiff allowed a credit of \$857.92, leaving a balance of \$3621.67, and this not having been paid by G. B. Shaffner, suit was brought in February, 1921, against the guarantor, the defendant. What the result of this suit was does not appear. The instant case was begun on October 31, 1925. The case was tried and there was a directed verdict for the plaintiff for the amount of its claim. Afterwards a new trial was granted the defendant and he was given leave to file an amended affidavit of merits, setting up an additional ground of defense, namely, that the written guarantee when signed by him on July 28, 1920 ran to Jenkins-Kreer & Co. and that afterwards, without his knowledge or consent, plaintiff's name was inserted in lieu of Jenkins-Kreer & Co. The issues were submitted to a jury and there was a finding in favor of plaintiff for the amount of its claim.

1. The defendant contends that upon inspection of the written guarantee it appears that the name of the guarantor has been changed; that this was a material alteration and the presumption of law is that the alteration was made after the guarantee was executed, and therefore, before it was admissible in evidence, it was incumbent upon plaintiff to satisfactorily explain the alteration. Where an

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1. The defendant contends that upon investigation of the witness' statement it appears that the name of the witness has been changed; that this was a material alteration and the presumption of law is that the alteration was made after the witness was examined, and therefore, before it was admitted in evidence, it was incompetent and claim will be made to explain the alteration. There is

alteration appears in an instrument there is no presumption that the alteration was made before or after its execution. Gage v. City of Chicago, 225 Ill. 318; Hargreaves v. Clark, 293 Ill. 256. In the Gage case the court said (p.220): "The law indulges no presumption as to when a change in a written instrument was made, but requires the party offering an altered instrument in evidence, if the alteration is material, to explain such alteration satisfactorily to the court before the instrument will be admitted in evidence. Such explanation may satisfactorily appear from the instrument itself or it may be made by extrinsic evidence." In the instant case there is no merit to defendants contention because it was admitted that the alteration had been made, but witnesses for plaintiff testified that this was done before the defendant signed the written guaranty. There was some evidence to the contrary. The question was submitted to the jury and its finding in favor of the plaintiff is, we think, in accordance with the evidence.

2. A further point is made by the defendant that the court erred in excluding evidence offered by him tending to show that plaintiff was a foreign corporation and had not complied with the laws of this state by obtaining a license to do business here. The evidence shows that Jenkins-Kreer & Co. had its place of business in Chicago and that it was the selling agent for plaintiff in this section of the country; that it solicited orders for plaintiff and forwarded them to Wheeling, West Virginia where they might be accepted or rejected. It further appears that the goods in question were transported from West Virginia to Indiana. This was inter-

allegation appears in an instrument dated in 1895-
suggestion that the allegation was made before or after the
execution. Case v. City of Chicago, 228 Ill. 216;
Wendell v. City of Chicago, 228 Ill. 216. In the Case and
court said (p. 216): "The law requires no presumption
as to when a change in a written instrument was made, but
requires the party asserting an altered instrument to estab-
lish, if the allegation is material, to explain why
alteration satisfactorily to the court before the instru-
ment will be admitted in evidence. Such explanation may
satisfactorily appear from the instrument itself or it
may be made by extrinsic evidence." In the instant case
there is no merit in defendant's contention because it
was admitted that the allegation had been made, but witness
for plaintiff testified that this was done before the instrument
and signed the witness' testimony. There was some evidence as
the contrary. The question was submitted to the jury and
the finding in favor of the plaintiff is, we think, in accord-
ance with the evidence.

3. A further point is made by the defendant that the
court erred in excluding evidence offered by him tending to
show that plaintiff was a foreign corporation and had not con-
plied with the laws of this state by obtaining a license to do
business here. The evidence shows that Jackson-Knox & Co.
had its place of business in Chicago and that it was the
calling agent for plaintiff in this section of the country
that it solicited orders for plaintiff and forwarded them to
Wholesale and Virginia where they might be manufactured or re-
packed. It further appears that the goods in question were
transported from West Virginia to Indiana. This was later

state commerce, and therefore, the statute of this state in reference to foreign corporations being licensed in this state is inapplicable. London Guaranty & Accident Co., Ltd. v. Hatto, 234 Ill. App. 497; Lehigh Portland Cement Co. v. McLean, 345 Ill. 326; International Text Book Co. v. Pigg, 217 U. S. 91. The offered evidence was properly excluded. Moreover the evidence fails to disclose that plaintiff was doing any business in this state within the meaning of our statute. There is no merit in the point.

3. It is further contended that the written guaranty is a collateral guaranty and not an absolute guaranty, and therefore, notice that plaintiff had accepted the guaranty and the fact that C. B. Shaffner had made default in payment must be given to the defendant before he can be held on the guaranty. On the other hand plaintiff's position is that the guaranty in question is an absolute guaranty and therefore, no notice of its acceptance was required nor was it not necessary that defendant be notified of the default in payment because the liability of the defendant was primary. The record discloses that the learned trial judge adopted plaintiff's view of the matter and the case was tried upon that theory. After a careful consideration of the questions involved, we are of the opinion that the contention of the defendant must be sustained and under the law, the written guaranty was a collateral and not an absolute guaranty. Where the guaranty is an absolute one, the guarantor is not entitled to demand or notice of non-performance, but when the undertaking is collateral, notice must be given within a reasonable time unless circumstances

exist which will excuse the want of notice. If the principal in the guaranty is insolvent when the default is made so that no benefit would accrue to the guarantor from the receipt of notice, none is required. Where the guarantor claims that he has been damaged for failure to give notice of the default, this is a matter of defense. Tassig v. Reid, 145 Ill. 483; Bamrow v. National Lead Co., 236 Ill. 638; Port Dearborn National Bank v. Miller, 178 Ill. App. 450. In the Taussig case suit was brought against the guarantor on a written guaranty, which was as follows: "For value received, I hereby guarantee the prompt payment at maturity of any indebtedness owing to Reid Murdock & Fischer, by Mrs. Mathilde Zuckerman, of 370 State Street, and 214 and 216 North Clark Street, Chicago, for goods purchased, or which may be purchased hereafter of them, to the amount of fifteen hundred dollars (\$1500.00)." It was there held that the guarantor was entitled to notice within a reasonable time of the acceptance of the written guaranty and of the default. The facts there show that upon the execution of the guaranty, Reid, Murdock & Fischer commenced selling goods to Mrs. Mathilde Zuckerman. She afterwards failed and an action was brought against the guarantor. No notice was given the guarantor that the goods purchased by Mrs. Zuckerman had not been paid for and it was contended that the failure to give notice relieved the guarantor from liability. The court there instructed the jury that they were authorized to find for plaintiff although no demand and notice of nonperformance had been shown. This was held to be error. The court there said (p.491). "Whether notice of the default of a principal debtor is required in order to fix the liability of a guarantor on a contract like the one

exists which will ensure the want of notice. If the principal
is the guaranty is involved then the default is made on that
no default would occur in the principal from the receipt
of notice, none is required. Where the guaranty claims
that he has been damaged for failure to give notice of the
default, etc. is a matter of fact. WILLIAM T. BELL, JR.
vs. WILLIAM T. BELL, JR. and WILLIAM T. BELL, JR.
The Court held that the guaranty was not liable for
a written guaranty, which was as follows: "For value received
I hereby guarantee the prompt payment of a promissory note
indorsed by said William T. Bell, Jr. of \$100.00, by Mrs. BELL, JR.
and Mrs. BELL, JR. and the said Mrs. BELL, JR.
of Chicago, for goods purchased, whether or not purchased
in whole or in part, to the amount of fifteen hundred dollars
(\$1500.00). It was there held that the guaranty was entitled
to notice within a reasonable time of the completion of the
written guaranty and of the default. The Court there held
that upon the execution of the guaranty, said William T. Bell, Jr.
commenced selling goods to Mrs. BELL, JR. and the
guaranty failed and an action was brought against the
guaranty. The notice was given the guaranty that the goods
purchased by Mrs. BELL, JR. had not been paid for and it was
contended that the failure to give notice relieved the guaranty
from liability. The Court there instructed the jury that
they were authorized to find the guaranty liable on the
fact and notice of nonpayment had been given. This
was held to be error. The Court there said (p. 421). "Whether
notice of the default of a principal debtor is required in order
to fix the liability of a guarantor on a contract like the one

involved, is a question upon which the authorities are conflicting. * * *

"Story on Contracts, Vol. 2, Sec. 1133, in the discussion of the question, says: 'Whenever the undertaking by a guarantor is absolute, notice is unnecessary, but where it is collateral merely, notice must be given within a reasonable time, otherwise the guarantor will be discharged, unless he is not prejudiced by the want of notice. In Baylies on Sureties and Guarantors, 202, the author says: 'It may be laid down as a general rule, that in case of an absolute guaranty the guarantor is not entitled to demand or notice of non-performance, but where the undertaking is collateral and not absolute, notice must be given within a reasonable time, unless circumstances exist which will excuse the want of notice. If the principal is insolvent when the debt becomes due or default is made, so that no benefit could be derived by the guarantor from the receipt of notice, no notice is required.'" The law as above announced is not disputed in this case, but the difficulty is applying the law to the facts in a particular case. And in the Tassig case, the court in considering the facts as disclosed by the evidence said, (p.492): "It will be observed that the amount of the goods which might be purchased, nor the time during which the deal between Mrs. Zuckerman and appellees should continue, was not mentioned or determined. The contract did not compel Mrs. Zuckerman to purchase or appellees to sell a dollar's worth of goods. They could deal with each other as much or as little as they might desire or as they might see proper. After the guaranty was executed, if appellee chose not to sell Mrs. Zuckerman any goods, it

involved, is a question upon which the authorities are
conflicting.

"History of Commerce, Vol. II, Sec. 1111, in the

discussion of the question, says: 'Whenever the underlying
by a Government is simulated, notice is unnecessary, but there
it is sufficient merely, notice must be given within a reason-
able time, otherwise the Government will be discharged, unless
he is not prejudiced by the want of notice. In practice an
intention and Government, Sec. 1111, the author says: 'It may be
be laid down as a general rule, that in case of an absolute
knowingly the Government is not entitled to demand notice
of non-performance, but where the underlying is simulated
and not absolute, notice must be given within a reasonable
time, unless circumstances exist which will excuse the want
of notice. It the principle is involved when the fact
becomes due on default is made, as first no benefit could be
derived by the Government from the receipt of notice, no
notice is required.' The law as above announced is not
disputed in this case, but the difficulty is applying the
law to the facts in a particular case. And in the Tracy
case, the court in considering the facts as disclosed by the
evidence said (p. 441): 'It will be observed that the
amount of the goods which might be purchased, nor the time
during which the deal between the Government and applicant
should continue, was not mentioned or determined. The gov-
ernment did not compel the Government to purchase or speculate
to sell a certain sort of goods. They would deal with each
other so much as each might have right to do or as they
might see proper. After the contract was executed, it
applies more not to sell the Government any goods, it

could not be claimed that any absolute guaranty existed, because there was no debt upon which it could operate. How can a guaranty be absolute where it is uncertain whether a debt will ever exist to which it could apply? We think it is manifest that the guaranty was not an absolute undertaking, but, on the other hand, the contract in question was a continuing guaranty of a debt to be created in the future, of an indefinite amount, depending upon the will of appellees and Mrs. Zuckerman." And further the court there quoted with approval from Smith v. Bainbridge, 6 Blackford, 12, the following: "If the writer states that he will guarantee the payment of the goods to be afterwards sold to another, or that he will see the goods paid for, or that he will be security for their payment, the promise is only collateral." And further (p.494): "Rare the appellants were apprised when they executed the guaranty that it was accepted by appellees; no further notice of acceptance was, therefore, required. But while the testimony disclosed that Mrs. Zuckerman became insolvent on the 24th day of November, 1887, no notice of her default in payment was furnished to appellants before her failure. We think that the decided weight of authority establishes the rule, that in case of a collateral continuing guaranty, like the one in question, reasonable notice of the default of payment on the part of the principal debtor should be given to the guarantor. And the guarantor will be discharged from payment, so far as he has sustained loss or damage, resulting from a failure of the creditor to give him such notice."

In the Hamerow case where the written guaranty was the same in effect as the one involved in the Taussig case,

[illegible]

it was said (p. 634): "As to all the indebtedness created after the execution of the guaranty the undertaking was collateral and continuing, and could be revoked or withdrawn at any time thereafter upon notice to defendant in error and the guarantors' liability would, in such case, only cover the sales made pursuant to it and before the notice." And further (pp. 635-6) "Plaintiff in error contends that he was entitled to timely notice of the default of the Berner-Mayer Company, and that as notice was not given for about a year and a half after the failure and assignment of said company, he is released. * * *

"The general rule undoubtedly is, that where the guaranty, as here, is a collateral, continuing one, the guarantor is entitled to reasonable notice of the default of the principal debtor. (*Taussig v. Reid*, 145 Ill. 488) The purpose of this notice is to enable the guarantor, if he elects to pay the guaranty and at once proceed against the principal debtor, to reimburse himself for the moneys thus paid." And it was there further held that the right to such notice was not an absolute right and failure to give it could only be availed of when it appears that the guarantor had suffered loss; that if at the time of the default the principal debtor was insolvent, the failure to give notice was no defense and that where it was claimed the guarantor had suffered loss on account of failure to give notice of the default, was a matter of defense.

The Taussig case has been cited with approval a number of times by our Supreme Court and by this court, and so far as we are advised, the holding in that case has not been modified or departed from. Under the rule announced in that case, we held that the guaranty involved in the

it was said (p. 112) "as to all the statements made after
the execution of the contract the understanding was satisfactory
and continuing, and would be revised or withdrawn at any time
without any notice to defendant in error and the plaintiff.
Likewise, in such case, only under the same with the
plaintiff as to the contract and notice." (p. 112-113)
"Plaintiff is never satisfied that he was entitled to simply re-
line of the details of the contract with defendant, and that he
never was not given for about a year and a half after the
plaintiff and defendant of said contract, he is released."
"The general rule undoubtedly is, that where the
contract, as here, is a unilateral, continuing one, the
plaintiff is entitled to reasonable notice of the details of
the contract. (See, e.g., *Boyd v. Boyd*, 142 Ill. 483)
The purpose of this notice is to enable the plaintiff, if he
elects to pay the contract and at once proceed against the
contractor, to reimburse himself for the money paid.
And it was these facts which led the court to hold
notice was not an absolute right and plaintiff to give it
could only be avoided or when it appears that the contract
has not been made; that it is not the duty of the plaintiff to
give notice to the defendant, the plaintiff to give notice
was not the duty and that where it was obtained the defendant
had not been made on account of failure to give notice of
the details, was a question of fact."
"It is said that the contract was not made with plaintiff
a number of times by our Supreme Court and by this court,
and so the rule is established, the holding in that case has
not been modified or departed from. Under the rule announced
in that case, we hold that the contract made in the
case at issue is not a contract and the plaintiff is not entitled to recover."

instant case is a continuing collateral guaranty and not an absolute and unqualified one. In the case of Frost v. Safford Metal Co., 215 Ill. 240 cited by plaintiff, it appeared that the metal company extended credit to George K. Harrington & Co. upon a written guaranty signed by Frost whereby he guaranteed the purchase account of George K. Harrington & Co. to the amount of \$1500.00. The metal company had declined to give Harrington & Co. credit but upon receiving the written guaranty, sold goods on credit to Harrington & Co. Afterwards the company went into bankruptcy and suit was brought on the written guaranty. The last goods there sold were in January 1902 and on January 30th following the metal company notified Frost that payment had not been made and demanded payment from him. In February Harrington & Co. became bankrupt, the court said that the undisputed evidence was that Frost had been notified by the metal company that they would accept his guaranty and that when he signed the guaranty he knew he had already been accepted as a guarantor and therefore, no notice of acceptance was necessary. The court there said (p.242) "Moreover, the guaranty is absolute and unqualified and such guaranties become effective as soon as acted upon." This is all that is said on the point and we cannot believe that the court meant to overrule the doctrine announced in the Tauszig case. Moreover, the court has in a number of cases since the decision in the Frost case was rendered approved the Tauszig case. (See Malleable Iron Range Co. v. Fussey, 344 Ill. 194-198; Scovill Mnf. Co. v. Cassidy, 275 Ill. 463, 467.)

instant case is a continuing relationship generally and not
an absolute and unqualified one. In the case of United v.
Ballard, 111 Ill. 240 cited by plaintiff, it was held
that the metal company intended orally to George
E. Harrington & Co. when a written contract signed by them
thereby he purchased the purchase account of George E.
Harrington & Co. in the amount of \$2500.00. The metal
company had declined to give Harrington & Co. credit
but upon receiving the written contract, said goods
on credit to Harrington & Co. Thereafter the company
went into bankruptcy and suit was brought on the written
contract. The trial judge said that it is clearly
and on January 30th following the metal company notified
them that payment had not been made and demanded payment
from him. In February Harrington & Co. became bankrupt
the court said that the evidence showed that they
had been notified by the metal company that they would
accept his contract and that when he signed the contract
he knew he had already been accepted as a customer and
therefore, no notice of acceptance was necessary. The court
there said (p. 222) "However, the contract is absolute and
unqualified and each party has been effective as soon
as made upon." This is all that is said on the point and
we cannot believe that the court meant to overrule the
doctrine announced in the Ballard case. However, the
court has in a number of cases since the decision in the
first case was reversed approved the Ballard case. (See
United v. Ballard, 111 Ill. 240-1-2-3;
United v. Ballard, 111 Ill. 240-1-2-3.)

Evidence was offered on behalf of the defendant tending to show that when he signed the guaranty in Jenkins-Kreer & Company's office, Chicago, he was told that he would not be accepted as guarantor until his financial standing was looked into and then he would be advised as to whether the guaranty signed by him would be accepted. There is also evidence in the record given on behalf of the plaintiff to the effect that no such understanding was had between Jenkins-Kreer & Co. and the defendant, so that this was a question of fact, subject to proof by direct and circumstantial evidence.

In an endeavor to show that he had been damaged by reason of the failure of plaintiff to notify him that C. B. Shaffner had made default in payment of the goods sold him, defendant offered some evidence to the effect that C. B. Shaffner was solvent and able to pay when the verdict was directed for plaintiff.

The defendant further contends that the action was barred within five years and that this defense was set up in his affidavit of merits. In support of this it is said that the goods sold to C. B. Shaffner were upon an open account and therefore, would be barred by the statute of limitations in five years. The instant case was brought upon a written contract made by the defendant, and therefore, under Sec. 16 of Chap. 83 the ten years statute of limitations would apply. Knight v. St. L., I.M. & S. Ry. Co., 141 Ill. 110. That section provides that an action upon written contracts must be brought within ten years after the cause of action accrues.

Witness was offered on behalf of the defendant
telling to show that when he signed the guaranty in January
knowing the company's affairs, Chicago, he was told that he would
not be expected to guarantee until the financial standing
was looked into and then he would be advised as to whether
the guaranty signed by him would be accepted. There is also
evidence in the record given on behalf of the plaintiff to
the effect that at some conference between the defendant and
Hunt & Co. and the defendant, on that date was a question
of fact, subject to proof by direct and circumstantial evidence.

In an endeavor to show that he had been damaged
by reason of the failure of plaintiff to notify him that
D. M. Sheltzer had made default in payment of the goods
sold him, defendant offered some evidence to the effect
that D. M. Sheltzer was solvent and able to pay when
the verdict was directed for plaintiff.

The defendant further contends that the action
was barred within five years and that this defense was
set up in his affidavit of answer. In support of this it is
said that the goods sold to D. M. Sheltzer were upon an open
account and therefore, would be barred by the statute of
limitations in five years. The instant case was brought
upon a written contract made by the defendant, and therefore,
under Sec. 16 of Chap. 38 the five years statute of limita-
tion would apply. Smith v. Smith, 111 Ill. 2d 101
111. Ill. That section provides that an action upon written
contracts must be brought within five years after the cause
of action accrues.

The defendant contends that the written guaranty should not have been admitted in evidence because it runs to J.L. Stifel & Sons and not to J. L. Stifel & Sons, a corporation, in whose name the suit was brought. There is no merit in this contention.

For the error in holding that the guaranty was an absolute guaranty, the judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

The following statement was given by the witness on 11/11/1944 in relation to the above mentioned case. It was in the presence of the undersigned and the undersigned is a member of the same. It was in the presence of the undersigned and the undersigned is a member of the same.

For the purpose of this statement, the witness is a member of the same. It was in the presence of the undersigned and the undersigned is a member of the same.

Witness: [Name]

Witness: [Name]

Witness: [Name]

Witness: [Name]

Witness: [Name]

Witness: [Name]

Witness: [Name]

Witness: [Name]

Witness: [Name]

Witness: [Name]

Witness: [Name]

Witness: [Name]

268 - 31400

DR. TROY SMITH,

Appellee,

v.

YOUR CAB COMPANY,
a corp.,

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Monday, June 13, 1927.

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

On March 18, 1926, plaintiff brought suit
in the Municipal Court of Chicago against defendant seeking
to recover \$75.00 for professional services rendered the de-
fendant. He filed his statement of claim on that day and
a summons was issued against the defendant returnable
March 23, 1926. The return of the bailiff shows that the
summons was served on the defendant by delivering a copy
of it together with a copy of the praecipe and statement
of claim and affidavit attached thereto to Mary Kemp, Agt.
of the corporation. The president, clerk, secretary, agent,
cashier, etc. of the corporation not being found in the
City of Chicago. On March 22nd the defendant filed a
special appearance and on March 31st it filed an affidavit
by its president in support of its special appearance where-
in it was set up that Mary Kemp in no way represented the
defendant on March 19th as the return of the bailiff pur-
ported to show. On April 26th the record discloses that
the defendant moved the court to quash the service of summons,

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100-1147

MR. JAMES H. HARRIS

APPEALS

V.

THE CITY OF CHICAGO

U.S. DISTRICT COURT

CHICAGO, ILL.

Opinion filed Monday, June 18, 1937.

MR. JUSTICE S. DENNIS delivered the opinion of

On March 12, 1936, plaintiff brought suit in the Municipal Court of Chicago against defendant seeking to recover \$75.00 for professional services rendered the defendant. He filed his statement of claim on that day and a summons was issued against the defendant returnable March 22, 1936. The return of the writ shows that the summons was served on the defendant by delivering a copy of it together with a copy of the process and statement of claim and affidavit attached thereto to Harry Kemp, agent of the corporation. The president, clerk, secretary, cashier, etc. of the corporation not being found in the City of Chicago. On March 22nd the defendant filed a special appearance and on March 23rd it filed an affidavit by its president in support of its special appearance where-in it was set up that Harry Kemp in company represented the defendant on March 12th as the return of the writ had been made to show. On April 22nd the record discloses that the defendant moved the court to grant the service of summons.

evidence was adduced and the motion denied. The defendant excepted and prayed an appeal from the order to the Appellate Court, which was allowed upon filing its bond and bill of exceptions. The record then shows that there was an ex parte hearing on the merits and a finding and judgment in favor of plaintiff for the amount of his claim of \$75.00.

The defendant contends that the evidence shows that Mary Kemp was not its agent on the day the summons was left with her; that the president and other officers were in Chicago at that time and were the proper officials to be served, and, therefore, the court erred in refusing to quash the service. An examination of the evidence indicates that there is merit to this contention, but we are unable to pass upon the matter because the order appealed from was not a final order and is, therefore, not appealable. If the defendant desired to question the ruling of the court in refusing to quash the service, it should have stood by its motion and when the court afterwards heard the case and entered judgment, it should have appealed from the judgment, limiting its motion in this respect for the sole and only purpose of questioning the ruling of the trial judge in overruling its motion to quash. People v. Saythe, 232 Ill. 242. It is only final orders that are appealable under Sec. 91 of the Practice Act. There are certain interlocutory orders that are made appealable by other provisions of the statute, but the one involved in this case is not one of them. The order appealed from not being a final order, the appeal must be dismissed.

evidence was submitted and the motion denied. The defendant
excepted and moved an appeal from the order to the appellate
court, which was allowed upon filing the bond and bill of
exceptions. The record then shows that there was an
error in the order and a finding and judgment in
favor of plaintiff for the amount of his claim of \$75.00.

The defendant contends that the evidence shows
that Mary Kemp was not the agent on the day the summons
was left with her; that the president and other officers
were in charge at that time and were the proper officials
to be served, and, therefore, the court erred in refusing
to grant the motion. An examination of the evidence indicates
that there is merit to this contention, but we are unable
to pass upon the matter because the order appealed from was
not a final order and is, therefore, not appealable. If
the defendant desired to question the ruling of the court
in refusing to grant the motion, it should have stood by
its motion and when the court afterwards heard the case
and entered judgment, it should have appealed from the
judgment, limiting its motion in this respect for the
sole and only purpose of questioning the ruling of the trial
court in overruling the motion to grant. People v. Smith,
200 Ill. 342. It is only final orders that are appealable.
Under Sec. 1 of the Practice Act. There are certain inter-
locutory orders that are made appealable by other provisions
of the statute, but the one involved in this case is not one
of them. The order appealed from was not a final order,
and the appeal must be dismissed.

The defendant is not in a position to argue that the statement of claim filed by the plaintiff does not state a cause of action because in making such argument it waives the question of service upon it and seeks to have the case determined upon its merits. We may say, however, that in this class of cases in the Municipal Court where no written pleadings are required, the same rule will govern as controls the form of actions before justices of the peace. Edgerton v. C. R. I. P. Ry. Co., 240 Ill. 311. And since the evidence that was heard by the court on the merits is not preserved in the bill of exceptions, we must presume that it was sufficient to support the judgment.

Holding as we do that the order appealed from was not final, it follows that the appeal must be dismissed.

APPEAL DISMISSED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

The defendant is not in a position to argue that
the statement of claim filed by the plaintiff does not
state a cause of action because in making such statement it
raises the question of evidence upon it and seeks to have
the case determined upon its merits. We say not, however,
that in this class of cases in the Municipal Court there
no written pleadings are required, the same rules will govern
as controls the form of actions before Justices of the Peace.
Macdonald v. R. F. I. F. W. U., 200 Ill. 311. And since
the evidence that was heard by the court on the merits is
not preserved in the bill of exceptions, we must presume
that it was sufficient to support the judgment.
Saying as we do that the order appealed from was
not final, it follows that the appeal must be dismissed.

ATTORNEY GENERAL

THOMAS, J. J. AND OTHERS, vs. STATE.

245 I.A. 618^{#3}

297 - 31429

IN RE ESTATE OF MALVINA B. SHEARER,
Deceased,

APPEAL OF J. B. DOLAND, Individually
and as Executor of the Last Will and
Testament of Sarah Doland, Deceased,

Appellant,

v.

WALTER JOSEPH, DE CLARK AND JOSEPH R.
McGLASHAN, Executor of the Last Will and
Testament of Malvina B. Shearer, Deceased,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Monday, June 13, 1927.

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

By this appeal J. B. Doland, Individually and
as Executor of the Last Will and Testament of Sarah Doland,
deceased, seeks to reverse an order of the Circuit Court of
Cook County overruling his objections to the final report
and account of the executors of the last will and testament
and codicil thereto of Malvina V. Shearer, deceased.

The record discloses that Malvina B. Shearer died
testate May 16, 1917, and on August 7, 1917, her will was
admitted to probate in the Probate Court of Cook County
and letters testamentary issued. On March 6, 1924, the
executors filed their final account and report, dated
February 20, 1924. The final account shows that the exe-
cutors had turned over to Walter Joseph De Clark, Joseph
R. McGlashan and P. S. Lent, as trustees, the residue of
the estate of the value of \$67,655.70. Objection was
filed to this item on the ground that the property did

247.11.618

207 - 11418

IN RE ESTATE OF WILLIAM A. HARRIS,
Deceased.

REPORT OF A. A. HARRIS, Individually
and as Executor of the last will and
testament of said deceased, deceased.
Petitioner.

STATE OF NEW YORK

County of New York

Justices of the Peace

IN SENATE, January 11, 1937.

REPORT OF THE COMMISSIONER OF TAXES

IN SENATE, January 11, 1937.
REPORT OF THE COMMISSIONER OF TAXES
IN SENATE, January 11, 1937.

Reported.

Opinion filed Monday, June 13, 1937.

THE COURT: The court delivered the opinion of

the court. It follows that the

By this report A. A. Harris, individually and
as executor of the last will and testament of said deceased,
seeks to reverse an order of the circuit court of
this county overruling his objection to the final report
and account of the executor of the last will and testament
and certain items of William A. Harris, deceased.

The record discloses that William A. Harris died
testate May 16, 1917, and on August 7, 1917, her will was
admitted to probate in the probate court of this county
and letters testamentary issued. On March 6, 1924, the
executors filed their final account and report, dated
February 20, 1924. The final account shows that the ex-
ecutors had turned over to Walter Joseph de Witz, Joseph
W. Hollenbach and J. Hart, as trustees, the residue of
the estate of the value of \$97,882.70. Objection was
filed at this time on the ground that the property was

not pass under the will but under the law to the heirs of the estate as intestate property.

The testatrix, Malvina B. Shearer, left her surviving as her only heir at law Sarah M. Doland, her maternal aunt, who died March 28, 1918 and letters testamentary were issued to her son J. B. Doland by the Probate Court, Lorain County, Ohio. A specific bequest was made in the will of Malvina B. Shearer of \$1,000.00 to Sarah M. Doland and a bequest of a similar sum to J. B. Doland. Mrs. Shearer's estate at the time of her death was estimated to be worth at least \$148,000.00. A number of specific bequests are made in the will, some to individuals and others to charitable institutions. The delay in closing the estate was caused by no act of the executors, nor of the objector, nor by any one connected with the estate, but was occasioned by matters over which none of the parties had any control.

The only question raised in the case is as to construction of a paragraph in the will which is as follows: "Thirteenth: I give, devise and bequeath all the rest, residus, and remainder of my estate, real, personal and mixed unto Walter Joseph De Clarke and Joseph R. McGlashan and the Reverend P. S. Lent and the survivors and survivor of them, in Trust However, to be distributed, as soon as practicable after my decease and within five (5) years from the date of my death, for charitable and educational purposes, to such needy individuals and worthy institutions, in such form, and upon such terms and conditions, as may be approved by said Trustees. Active supervision of such

not have under the will but under the law to the heirs
of the estate in absolute property.

The testatrix, Melvin E. Spencer, left her
property as her only heir at law John A. Spencer, her
natural son, who died March 26, 1918 and leaving three
nephews were named to her son J. A. Spencer by the trustee
George, Louis County, Ohio. A specific bequest was made
in the will of Melvin E. Spencer of \$1,000.00 to George
A. Spencer and a bequest of a certain sum to J. A. Spencer.
Mrs. Spencer's estate at the time of her death was esti-
mated to be worth at least \$10,000.00. A number of
specific bequests are made in the will, some to individuals
and others to charitable institutions. The delay in closing
the estate was caused by no act of the executor, nor of the
objector, nor by any one connected with the estate, but was
caused by matters over which none of the parties had
any control.

The only question raised in the case is as to
the validity of a paragraph in the will which is as follows:
"This bequest, I give, devise and bequeath all the rest,
residue, and remainder of my estate, real, personal and
mixed unto Walter Joseph E. Spencer and Joseph E. Spencer
and the Reverend F. E. Hunt and the survivors and survivors
of them, in trust however, to be distributed, as soon as
practicable after my decease and within five (5) years
from the date of my death, for charitable and educational
purposes, to such needy individuals and worthy institutions,
in such form, and upon such terms and conditions, as may
be approved by said trustees. Initial supervision of such

distribution shall be given by said P. S. Lent and it is my wish that he devote such time, attention and effort in examining, investigating and selecting those to be recipients hereunder as the trustees may deem advisable and he shall be paid reasonable compensation therefor out of the trust estate."

The objector's contentions are (1) that paragraph 13 is indefinite and uncertain; that the bequest therein provided for is for charitable as well as for non-charitable purposes and therefore, invalid. (2) that by the paragraph the testatrix vested discretionary power in the Rev. P. S. Lent to select the beneficiaries of the testatrix's bounty, and that since he failed to designate such beneficiaries and he having died May 28, 1924, the bequest failed and (3) that distribution of the property not having been made within five years after the testatrix's death, it cannot now be made.

1. In support of the contention that paragraph 13 is indefinite and uncertain, and that because the property therein mentioned may be disposed of by the trustees to charitable and non-charitable purposes, the provision is void, it is said that the words "for charitable and educational purposes to such needy individuals and worthy institutions, in such form and upon such terms and conditions as may be approved by such trustees" are uncertain and indefinite, because who may be considered "needy individuals or a worthy institution" may be determined by the whim or caprice of the trustees; that the trustees might exhaust the fund by giving it to non-charitable purposes. We think this contention is

...shall be given by said F. S. ...
...with that he ...
...examining, investigating and ...
...at the ...
...be paid ...

The objector's contention ... (1) ...
...is ...
...is for ...
...and therefore, ...
...the ...
...to select the ...
...and that since he failed to ...
...and he having died ...
... (2) that distribution of the property ...
...made within five years after the ...
...now be made.

1. In support of the contention that ...
...is ...
...therein ...
...charitable and non-charitable purposes, the provision is ...
...it is said that the words "for charitable and other-
...tional purposes to such ...
...in such ...
...governed by such ...
...because who may be ...
...limitation, may be determined by the ...
...trustees; that the trustees might exhaust the fund by giving ...
...it is non-charitable purposes.

unsound and not warranted. By a reasonable construction of the thirteenth paragraph of the will, the property therein mentioned is given to the trustees and to the survivors and survivor of them in trust with directions to the trustees that they dispose of it "for charitable and educational purposes to such needy individuals and worthy institutions, in such form, and upon such terms and conditions, as may be approved by such trustees." This clearly means that the property is to be given by the trustees or the survivors or survivor of them for charitable and educational purposes to needy individuals and worthy institutions. It cannot be disposed of by the trustees except for charitable and educational purposes. The funds cannot be used for non-charitable purposes. Gifts to charity are favored by the law of this state and our courts will, if possible, sustain them. Bruce v. Maxwell, 311 Ill. 478; Walker v. Central Tr. & Sav. Bank, 318 Ill. 253. We think the language is not subject to the construction sought to be placed upon it by the objector and his contention cannot be sustained under the language used. The bequest made under this paragraph was a charitable bequest. Stowell v. Prentiss, 323 Ill. 309. In that case the court speaking of charitable trusts said (p.318). "Charity, in a legal sense, is not confined to mere almsgiving or to the relief of poverty and distress but has a wider signification, and embraces the improvement and promotion of the happiness of man. (Congregational Sunday School and Publishing Society v. Board of Review, 290 Ill. 108). A charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of man socially.

unusual and not warranted. By a reasonable construction of
the charitable purposes of the will, the property therein
contained is given to the trustees and to the surviving and
deceased of those in favor with distribution to the trustees
that they dispose of it for charitable and educational
purposes to such needy individuals and worthy institutions,
in such form, and upon such terms and conditions, as may
be approved by such trustees. This clearly means that the
property is to be given by the trustees as the trustees or
survivors of them for charitable and educational purposes to
needy individuals and worthy institutions. It cannot be dis-
posed of by the trustees except for charitable and educational
purposes. The funds cannot be used for non-charitable purposes.
Gifts to charity are favored by the law of this state and our
courts will, if possible, construe them in favor of charity.
311 Ill. 479; Central B. & A. Ry. Co. v. City of Chicago, 313 Ill. 230.
We think the issue is not subject to the construction and as
to be placed upon it by the objector and his contention cannot
be sustained under the language used. The bequest made under
this paragraph was a charitable bequest. Central B. & A. Ry. Co. v. City of Chicago,
313 Ill. 230. In that case the court speaking of charitable
trusts said (p. 232). "Charity, in a legal sense, is not
confined to mere almsgiving or to the relief of poverty and
distress but has a wider significance, and embraces the im-
provement and promotion of the happiness of man. (Quoted from
Attorney General v. Trustees of the British Museum, 11 Q. B. 580.)
300 Ill. 100. A charitable use, when neither law nor public
policy forbids, may be upheld on almost anything that tends
to promote the well-being and well-being of man socially."

(People v. Walters Chapter of D.A.R. 311 Ill. 304)."

2. Nor do we concur in the contention of the objector to the effect that under paragraph 13 of the will the recipients of the deceased's bounty were to be selected by the Reverend Lent. The language used by the testatrix is that the active supervision and distribution of the fund was given to the Reverend Lent; that it was the deceased's wish that he devote his time in investigating and selecting who were to be recipients of the fund, but all of this was to be done subject to the approval of the trustees. The investigation and selecting of the recipients was to be done by the Reverend Lent under the sanction of the trustees and not by himself alone, nor was it contemplated by the testatrix that this paragraph of the will could not be carried out in case the Reverend Lent died because the devise is to the three trustees named and the survivors and survivor of them. Nor is it objectionable that the beneficiaries are uncertain because this is an essential feature of charitable trusts. Bruce v. Maxwell, 311 Ill. 429. In that case the court said: (p.425) "It is immaterial how uncertain the beneficiaries of a charitable trust are, * * * Indeed, 'it is an essential feature of public or charitable trusts that the beneficiaries are uncertain - a class of persons described in some general language, often fluctuating, changing in their individual numbers and partaking of a quasi public character'. The language used by the testatrix demonstrates that she did not intend that there should always be three acting trustees, but the will clearly provides that the property devised under the paragraph might be

Trusts v. Estate of a Decedent

2. Now as we proceed in the construction of the
instrument in the effort to find out whether it is the will
the testatrix of the deceased's property was to be disposed
by the deceased testatrix. The language used by the testatrix
is that the entire management and distribution of the
fund was given to the deceased testatrix; that it was the de-
ceased's wish that he devote his time in investigating and
selecting who were to be recipients of the fund, and all of
this was to be done subject to the approval of the trustees.
The investigation and selecting of the recipients was to
be done by the deceased testatrix under the direction of the
trustees and not by himself alone, nor was it contemplated
by the testatrix that this paragraph of the will would not be
carried out in case the deceased testatrix died because the
trustees in the three trustees named and the survivors and
survivors of them. Now it is objectionable that the bene-
ficiaries are uncertain because this is an essential feature
of charitable trusts. Trust v. Estate, 211 Ill. 482. It
does seem the court said: (p. 482) "It is immaterial how
uncertain the beneficiaries of a charitable trust are."
Indeed, it is an essential feature of public or charitable
trusts that the beneficiaries are uncertain - a class of per-
sons described in some general language, often fluctuating,
changing in their individual numbers and consisting of a class
but is character. The language used by the testatrix
demonstrates that she did not intend that there should
always be three acting trustees, but the will clearly provides
that the property devised under the paragraph might be

distributed as therein provided, although but one of the trustees survive. From this it is clear that it was the wish of the testatrix that Rev. Lent in case he survived, do the investigating and selecting of the recipients of the fund as the trustees might deem advisable" and that he be paid reasonable compensation therefor, but it was not her intention, in case this were not done by Rev. Lent, that the devise would become ineffective." Where property is devised in trust to trustees or the survivor of them and some of the trustees die, the surviving trustees have all the powers conferred by the will upon all of them. Mullanny v. Hangle, 313 Ill. 247.

3. The contention of the objector that distribution of the fund cannot be made more than five years after the testatrix's death is also untenable. The provision, that the property to be distributed "as soon as practicable after my decease and within five (5) years from the date of my death", was directory only and not mandatory. The record discloses that the distribution was not made within five years because it was not within the power of the executors or trustees to do so until the estate was closed it was not practical or possible to make distribution. This construction of the language is borne out by the fact that the testatrix made no provision in the will for the disposition of this property in case it was not distributed within five years from the date of her death.

In the case of Peck v. Woman's Home Miss. Society, 293 Ill. 337,

a devise was made to a church society on condition that it establish an orphanage on the premises within three years from the testatrix's death. There was a further provision that unless this was done the devise would be null and void and the property revert. The orphanage was not established within three years from the testatrix's death, but it was held that this did not defeat the devise to the church society, the delay having been caused by litigation brought by certain heirs who sought to defeat the devise. In the instant case it is stipulated that the delay was occasioned through no fault of the executors or trustees, but was occasioned by the fact that the assets could not be collected and distributed. We are, therefore, of the opinion that the devise to charity should not be defeated.

The order of the Circuit Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

a device was made to a certain extent in connection with it
established an exchange on the premises within three years
from the date of the lease. There was a further provision
that unless this was done the device would be null and void
and the property revert. The exchange was not accomplished
within three years from the date of the lease, but it was
held that this did not defeat the device as the money
received, the money having been used by the lessee to purchase
by certain heirs who sought to collect the money. In the
instant case it is stipulated that the money was not received
through an heir of the estate or trustee, but was
conveyed by the fact that the money was not so collected
and distributed. We are, therefore, of the opinion that the
device is clearly should not be set aside.

The order of the Circuit Court of Cook County

is affirmed.

ATTEST,

THOMAS, J. J. AND OTHERS, J. J.

371 - 31503

ABRAHAM J. CORN,

Appellee.

v.

WILLIAM SHAPIRO,

Appellant.

245 14 618 #4
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Monday, June 13, 1927.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover \$208.00, which, as we understand it, was the amount plaintiff claims to have advanced for the defendant in the purchase of a lot. Plaintiff further claimed that there was due him for teaching in a school run by the defendant the sum of \$340.00, being at the rate of \$30.00 per month as agreed upon between the parties. The defendant filed an affidavit of merits January 19, 1925, denying that he owed plaintiff anything and afterwards on February 24, 1925, filed a counter-claim for \$126.42, \$135.42 of this sum was claimed to be due the defendant for attorneys fees for services rendered by the defendant to the plaintiff, and a small item of costs. The balance was made up of \$51.00 which the defendant claimed he had loaned plaintiff.

The record is confused and incoherent. Near the close of the case the learned trial judge said "I never saw anything so mixed up in my life." After a consideration of all the evidence in the record, we are in entire accord with this statement. We think it appears, however, that the plaintiff, defendant and another person jointly purchased a lot

818 413

171 - 171

ALFRED A. BROWN

ALFRED A. BROWN

V.

ALFRED A. BROWN

ALFRED A. BROWN

Opinion filed Monday, June 13, 1937.

MR. JUSTICE

THE COURT

Plaintiff brought suit against the defendant on

complaint filed on June 13, 1937, and the defendant

pleaded in answer that the plaintiff claims to have advanced for the defendant in the

sum of \$100.00, and that the plaintiff further claims that there was

no loan for the sum of \$100.00 by the plaintiff to the defendant the sum

of \$100.00, being at the rate of \$20.00 per month as agreed

upon between the parties. The defendant filed an affidavit

of verity January 18, 1938, denying that he owed plaintiff

anything and afterwards on February 24, 1938, filed a counter-

claim for \$100.00, \$20.00 of this sum was claimed to be due

the defendant for advances made for various purposes by the

defendant to the plaintiff, and a small loan of money. The

balance was made up of \$21.00 which the defendant claimed he

had loaned plaintiff.

The record is complete and indisputable. But the

case of the case the learned trial judge said "I never saw

anything so mixed up in my life." After a consideration of

all the evidence in the record, we are in entire accord with

this statement. We think it appears, however, that the plain-

tiff, defendant and another person jointly purchased a lot

which was afterwards sold at a profit and the proceeds divided equally between the three. Plaintiff's evidence tends to show that he borrowed \$500.00 from the Morris Plan Bank with which to make a payment on the lot; that he made this payment, \$250.00 for himself and \$250.00 for the defendant, of which sum the defendant has repaid \$42.00, leaving a balance due of \$208.00. Plaintiff's evidence also tended to show that he was employed by the defendant to teach in a school which was conducted by the defendant. The court refused to allow anything for this item and it is not involved in this appeal. Evidence on behalf of the defendant was that he had rendered legal services to the plaintiff and had loaned plaintiff money and, therefore, the defendant was entitled to \$168.42. He also offered evidence to the effect that plaintiff did not advance any part of his payment on the lot, but that it was advanced by another person and this was corroborated by the third party. The court found in favor of the plaintiff for \$208.00 and against the defendant on his setoff and judgment was entered in favor of the plaintiff for \$208.00.

Counsel for plaintiff in his brief in this court says that the evidence discloses that plaintiff borrowed \$500.00 from the Morris Plan Bank, which was to be re-paid in monthly installments, and he further says that "plaintiff introduced in evidence stubs showing the payments with notations marked 'A.J.C.' and one marked 'Shapiro', each payment being in the sum of \$42.00; and further testified that the said defendant was to make payments from time to time until his half of \$250.00 was paid plaintiff; that he failed to do so and that plaintiff was compelled to make the payments, and advanced for the defendant the sum of \$208.00 on said loan, to the

which was afterwards sold at a profit and the proceeds divided equally between the three. Plaintiff's evidence tends to show that he borrowed \$200.00 from the Martin Loan Bank which he made a payment on the 1st; that he made this payment, \$100.00 for himself and \$100.00 for the defendant, at which time the defendant had repaid \$45.00, leaving a balance due of \$155.00. Plaintiff's evidence also tends to show that he was employed by the defendant to teach in a school which was conducted by the defendant. The court refused to allow anything for this item and it is not involved in this report. Evidence on behalf of the defendant was that he had borrowed legal services to the plaintiff and had loaned plaintiff money and, therefore, the defendant was entitled to \$155.00. He also offered evidence to the effect that plaintiff did not advance any part of his payment on the 1st, but that it was advanced by another person and this was corroborated by the third party. The court found in favor of the plaintiff for \$200.00 and against the defendant on the 1st and judgment was entered in favor of the plaintiff for \$200.00.

Plaintiff for plaintiff in his brief in this court says that the witness disclosures that plaintiff borrowed \$200.00 from the Martin Loan Bank, which was to be repaid in monthly installments, and he further says that plaintiff introduced in evidence books showing the payments with notations marked 'A.B.C.' and one marked 'B.C.D.', each payment being in the sum of \$45.00; and further testified that the said defendant was to make payments from time to time until the full of \$200.00 was paid plaintiff, that he failed to do so and that plaintiff was compelled to make the payments, and advanced for the defendant the sum of \$200.00 on said loan, to the

Morris Plan Bank. Notations appearing on said stubs made by the plaintiff are evidence to corroborate the intention and agreement of the parties (Rec.26).^{*} A reading of the record referred to shows that when plaintiff was testifying, some document referred to as exhibit 1 for identification, was before the court, but the questions put to the witness and the answers made as they appear in the record are incoherent and meaningless. There is no exhibit in the record, nor are we able to say what was before the court so that it appears that the trial judge who saw and heard the witnesses and whatever the document was, was in a much better position to determine the facts in the case than we are sitting in a court of review. The court found in favor of the plaintiff and against the defendant and we are unable to say that this finding was unwarranted.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

Article 17 of the Constitution of the United States

by the plaintiff are evidence in support of the motion

for judgment of the motion (No. 100) is hereby set

aside and the motion is denied with costs to the plaintiff.

and judgment entered in favor of the defendant.

and before the court, but the defendant has not shown that the

plaintiff is not entitled to the relief sought and

therefore, there is no relief in the present case and the

motion is denied with costs to the plaintiff.

and the trial judge has heard the evidence and

found the defendant not liable and the plaintiff

liable and the court has entered judgment in favor of the

plaintiff and the court has entered judgment in favor of the

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245 I.A. 619#1

380 - 31512

EDWIN E. PARRY,

Appellee,

v.

FITZFIELD & STEENSON,
a corp.,

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Monday, June 13, 1927.

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

Plaintiff brought an action against the defendant to recover a balance which he claimed was due for services rendered the defendant for the year 1924 and for eight months in the year 1925. The defendant filed an affidavit of merits denying that it was indebted to plaintiff in any sum, but on the contrary, it set up that plaintiff was indebted to the defendant in the sum of \$281.40 and filed its setoff for that amount. The case was heard before the court without a jury and there was a finding and judgment in plaintiff's favor for \$594.00 and the defendant appeals.

The record discloses that the defendant was engaged in the clothing business in Chicago and employed plaintiff as one of its salesmen from 1921 until September, 1925; that plaintiff was paid a weekly salary and also a percentage on the gross sales in excess of a certain specified figure; that for the year 1922 plaintiff was paid by the defendant in addition to his weekly salary, a commission

2451A. 613

300 - 3111

ROBERT E. BERRY

Specialist

Chief Clerk

Administrative

or other

UNITED STATES

Attorney

Opinion filed Monday, June 13, 1937.

Mr. Justice Brandeis delivered the opinion of the court.

the court.

Plaintiff brought an action against the defendant to recover a balance which he claimed was due for services rendered the defendant for the year 1935 and for the year 1936. The defendant filed an affidavit of service denying that it was indebted to plaintiff in any sum, but on the contrary, it set up that plaintiff was indebted to the defendant in the sum of \$200.00 and filed its answer for that amount. The case was heard before the court without a jury and there was a finding and judgment in plaintiff's favor for \$200.00 and the defendant's expenses.

The record discloses that the defendant was engaged in the clothing business in Chicago and employed plaintiff as one of its salesmen from 1931 until September, 1935; that plaintiff was paid a weekly salary and also a percentage on the gross sales in excess of a certain specified figure; that for the year 1935 plaintiff was paid by the defendant in addition to his weekly salary, a commission

of five percent on \$14,000.00 and for the year 1923 a like commission on \$25,000.00. These commissions were occasioned under the following circumstances: During 1923, \$14,000.00 worth of clothing, some of which had been sent on approval, was returned to the defendant by its customers and they were given credit accordingly. The same was true for the year 1923, except the value of the clothing returned was \$25,000.00. In the latter part of the year 1923 plaintiff and defendant's president discussed the question as to what arrangements might be for plaintiff's employment for the year 1924, plaintiff's version being that it was agreed that he was to have charge of the clothing department of defendant's business for which he was to be paid \$100.00 per week and in addition five percent on the "gross sales" of the clothing department in excess of \$100,000.00. On the other hand, the defendant's position is that the agreement was that plaintiff's salary would be increased \$25.00 per week for the year 1924, he having been paid \$75.00 per week for 1923, and in addition plaintiff would receive five percent commission on the "net gross sales" of the clothing department in excess of \$100,000.00. So that the only dispute between the parties on the trial and in this court is whether plaintiff was to be paid in addition to the weekly salary, a commission of five percent on all clothing sent out by the defendant in excess of \$100,000.00, or whether this five percent should be computed on the sales in excess of \$100,000.00 and that the clothing that was returned should not be considered as sales. Plaintiff gave testimony to the effect that he was to be paid his commission on the "gross sales", while on the other hand, the defendant offered evidence to the effect that the commission

of five percent on \$14,000.00 for the year 1931 in the
commission on \$28,000.00. These commissions were calculated
under the following circumstances: During 1931, \$14,000.00
worth of clothing was shipped and was sent to approval.
was returned to the defendant by the defendant and that was
given credit accordingly. The same was true for the year
1932, except the value of the clothing returned was \$12,000.00.
In the latter part of the year 1932 plaintiff and defendant's
president discussed the question as to what arrangements might
be for plaintiff's employment for the year 1933. Plaintiff
verifies being that it was agreed that he was to have charge
of the clothing department of defendant's business for which
he was to be paid \$100.00 per week and in addition five
percent on the "gross sales" of the clothing department in
amount of \$100,000.00. On the other hand, the defendant's
testimony is that the agreement was that plaintiff's salary
would be increased \$25.00 per week for the year 1933, he
having been paid \$75.00 per week for 1932, and in addition
plaintiff would receive five percent commission on the "net
gross sales" of the clothing department in amount of \$100,000.00.
He said the only dispute between the parties on the trial
and in this court is whether plaintiff was to be paid in
addition to the weekly salary, a commission of five percent
on all clothing sent out by the defendant in excess of
\$100,000.00, or whether said five percent should be computed
on the sales in excess of \$100,000.00 and that the clothing
that was returned should not be considered as sales. This
bill gave testimony to the effect that he was to be paid
his commission on the "gross sales", while on the other hand,
the defendant offered evidence to the effect that the commission

was to be paid not on the "gross sales" but on the "net gross sales."

It was not suggested in the trial court, nor is it suggested in the briefs filed in this court, that clothing which had been sent out on approval to the defendant's customers and which was returned, had in no sense been sold, nor that even on plaintiff's version of the case to the effect that he was to be paid on "gross sales", no recovery could be had because the clothing on which he is basing his commission and on which the judgment is rendered was not sold. On the trial and in this court both parties presented their respective contentions on the theory that if the agreement between the defendant and plaintiff was that he was to be paid his commission on the "gross sales" then the judgment is correct. But, as stated, the theory of the defendant was, as testified to by its president, that plaintiff's commission was to be computed on the "net gross sales". And in this view defendant contends that the clothing which had been returned during the year 1924 should not be taken into consideration in figuring plaintiff's commissions. Obviously, there is no such thing as "net gross sales". The words "net gross sales" are a contradiction in terms. The Century Dictionary defines gross as "opposed to net." But it is conceded by the defendant that if the agreement between the parties was that commissions were to be paid on the "gross sales", the judgment is correct. The evidence on this question was sharply conflicting and unless we can say that the finding and judgment is against the manifest weight of the evidence, we are not warranted in disturbing the judgment. Upon a careful consideration of all the evidence in the record we are unable

was to be paid not on the "gross sales" but on the net
gross sales.

It was not suggested in the trial court, nor
is it suggested in the briefs filed in this court, that
anything which had been sent out or approved to the delin-
quent's customers and which was returned, had in any sense
been sold, nor that even on plaintiff's version of the case
to the effect that he was to be paid on "gross sales", no
amount would be due because the clothing in which he is
bearing the commission and on which the judgment is rendered
was not sold. On the trial and in this court both parties
presented their respective contentions on the theory that it
was the agreement between the defendant and plaintiff that
that he was to be paid his commission on the "gross sales".
Then the judgment is correct. But, as stated, the theory
of the defendant was, as certified to by the president
that plaintiff's commission was to be computed on the
"net gross sales", and in this view the defendant
that the clothing which had been returned during the year
1934 should not be taken into consideration in figuring
plaintiff's commission. Obviously, there is no such
thing as "net gross sales". The words "net gross sales"
are a contradiction in terms. The Century Dictionary defines
gross as "opposed to net". But it is contended by the defend-
ent that if the agreement between the parties was that com-
mission was to be paid on the "gross sales", the judg-
ment is correct. The reliance on this contention was wholly
unfounded and unless we can say that the finding and judg-
ment is against the weight of the evidence, we are
not warranted in disturbing the judgment. Upon a careful
consideration of all the evidence in the record we are unable

to say that the finding and judgment is against the manifest weight of the evidence.

The defendant contends that the judgment is wrong and should be reversed because the evidence does not sustain the allegations of plaintiff's statement of claim. With this contention we are unable to agree. Plaintiff alleged in his statement of claim that he was to be paid the commission on the "gross sales" and in construing gross sales as the parties themselves construe them, we think the evidence was sufficient to sustain the finding and judgment.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

to say that the finding and judgment is against the
weight of the evidence.

The court says that the finding is wrong and
should be reversed because the evidence does not in fact
establish the defendant's guilt. The court says that
the evidence is not sufficient to establish the
defendant's guilt. The court says that the evidence
is not sufficient to establish the defendant's guilt.
The court says that the evidence is not sufficient
to establish the defendant's guilt.

The judgment of the district court is hereby
reversed and the case is remanded to the district court
for further proceedings.

ATTORNEY

FILED, U.S. DISTRICT COURT, S.D. CALIF.

389 - 31531

EVERETT OWENS,

Appellee,

v.

DR. J. S. NAGEL,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Monday, June 13, 1927.

MR. JUSTICE O'DONNOR delivered the opinion of the court.

Plaintiff, the endorsee, of a promissory note on April 18, 1924, brought suit against the defendant maker, to recover \$1,500.00, the face of the note, together with interest thereon. At the close of the evidence, the court instructed the jury to find for the plaintiff and a verdict was accordingly returned, judgment was entered on the verdict and the defendant appeals.

Plaintiff's statement of claim alleges the making of a promissory note by the defendant for \$1500.00 on March 23, 1923, payable to the order of John F. Erisman, trustee, one year after date with interest thereon; that for a good and valuable consideration paid by plaintiff to the payee before maturity, the note was endorsed by the payee to the plaintiff. On May 26, 1924, the defendant filed an affidavit of merits in which he alleged that plaintiff was not a holder in due course; that the note was given in payment of stock of The Blue Flag-Silverton Gold Mines Company, a foreign corporation, which stock was sold by the payee in the note -

2451A. 619

NEW - 1937

STANDARD BANK

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Opinion filed Monday, June 18, 1937.

the court.

plaintiff, the defendant, of a promissory note on April 18, 1936, brought suit against the defendant maker to recover \$1,200.00, the face of the note, together with interest thereon. At the close of the evidence, the court instructed the jury to find for the plaintiff and a verdict was accordingly returned. Judgment was entered on the verdict and the defendant appeals.

plaintiff's statement of claim alleges the making of a promissory note by the defendant for \$1,200.00 on March 22, 1936, payable to the order of John F. Williams, trustee, one year after date with interest thereon; that for a good and valuable consideration paid by plaintiff to the payee before maturity, the note was endorsed by the payee to the plaintiff. On May 26, 1936, the defendant filed an affidavit of notice in which he alleged that plaintiff was not a holder in due course; that the note was given in payment of stock of The Blue Flag-Beverage Cold Drink Company, a foreign corporation, which stock was sold by the payee in the note -

John F. Erisman, President; that the stock was "class D Securities" within the Illinois securities law, and that the Blue Flag-Silverton Gold Mines Company had not complied with that law by filing the documents required by statute with the Secretary of State; that plaintiff at the time he obtained the note from the payee knew that the Illinois Securities Law had not been complied with. A further defense was that the note was without consideration and that the defendant was informed and believed that plaintiff knew of that fact when he obtained the note. A further defense was that the note was given to John F. Erisman, trustee, "upon trust that he would hold the same until maturity and that he would not negotiate the same and that plaintiff had notice of said infirmity in the title of the person negotiating said note."

Nearly a year afterwards on April 23, 1935, the defendant, by leave of court, filed an amended affidavit of merits wherein he set up as defenses the following: (1) that he made and executed the note and handed it to the payee upon condition that the payee would hold the note for the benefit of the defendant and the Blue Flag-Silverton Gold Mines Company, the beneficial owner of the note, until the maturity of the note and until the Gold Mines Company had paid to the defendant its then indebtedness which was largely in excess of the face of the note; (2) that (upon information and belief) the note was not endorsed to plaintiff by the payee before maturity or for good and valuable consideration; (3) that the note was delivered in Illinois on its date for 3500 shares of capital stock of the Gold Mines Company the stock having been sold to defendant by

John F. Henson, President; that the stock was sold to Henson within the Illinois Securities Law, and that the Hine Flag-Riverston Gold Mines Company had not complied with that law by filing the documents required by statute with the Secretary of State; that plaintiff at the time he obtained the note from the payee knew that the Illinois Securities Law had not been complied with. A further defense was that the note was without consideration and that the defendant was informed and believed that plaintiff knew at that time that he obtained the note. A further defense was that the note was given to John F. Henson, trustee, upon trust that he would hold the same until maturity and that he would not negotiate the same and that plaintiff had notice of said trust in the title of the person negotiating said note.

Shortly after the execution on April 22, 1922, the defendant, by leave of court, filed an amended affidavit of merits wherein he set up as defenses the following: (1) That he made and executed the note and handed it to the payee upon condition that the payee would hold the note for the benefit of the defendant and the Hine Flag-Riverston Gold Mines Company, the beneficial owner of the note, until the maturity of the note and until the Gold Mines Company had paid to the defendant the then indebtedness which was largely in excess of the face of the note; (2) That upon information and belief the note was not entered to plaintiff by the payee before maturity or for good and valuable consideration; (3) That the note was delivered in Illinois on its date for 2500 shares of capital stock of the Gold Mines Company the stock having been sold to defendant by

Erisman, the president and general manager of the company the payee named in the note in violation of the Illinois Securities Law; that at and prior to the execution of the note, Erisman falsely and fraudulently represented to the defendant that the Gold Mines Company "was then well and amply financed" and prepared to begin active mining operation; that the defendant relied upon such representations and was deceived thereby and was induced to make the note and deliver it to the payee to be held by him; (4) that plaintiff was not a holder in due course; that he had not taken it before maturity; that he did not take it in good faith, nor for value and upon information and belief - it was alleged that the note was transferred to plaintiff for the purpose of cutting off defenses.

The evidence tends to prove that John F. Erisman was president, manager and trustee of the Blue Flag-Silverton Gold Mines Company of Colorado, which is stated to be a common law trust, but there is no evidence of this; that Erisman had been acquainted for some time with the defendant and that the defendant prior to the date of the note in suit, was the owner of some stock in the Gold Mines Company; that on March 23, 1925, Erisman called at the defendant's office in Chicago and sold him 3500 shares of stock in the Gold Mines Company in payment of which the defendant paid \$500.00 cash and executed the note in question; that shortly thereafter a certificate for the 3500 shares of stock in the Gold Mines Company was delivered to the defendant; that on September 13, 1925, plaintiff who was a practicing attorney of Denver, Colorado, bought the note in question by

...the president and general manager of the
company the paper would in the note in violation of the
Illinois Securities Law; that at and prior to the time
of the note, Eisman falsely and fraudulently
represented to the defendant that the Gold Mine Company
was then well and truly financially and prepared to begin
active mining operations; that the defendant relied upon
such representations and was deceived thereby and was in-
duced to make the note and deliver it to the paper to be
held by him; that plaintiff was not a holder in the
note; that he had not taken it before maturity; and
he did not take it in good faith, but for value and upon
information and belief - is one alleged that the note
was introduced to plaintiff for the purpose of securing
off balance.

The evidence tends to prove that John E. Eisman
was president, manager and trustee of the Gold Mine Company
and that the defendant, who is alleged to be a
common law trust, but there is no evidence of this; that
Eisman had been convicted for some time with the defendant
and that the defendant acted for the note of the note is
said, was the owner of some stock in the Gold Mine Company;
that on March 22, 1922, Eisman called at the defendant's
office in Chicago and said his 2500 shares of stock in the
Gold Mine Company in payment of which the defendant paid
\$2500.00 and asked the note in question; that shortly
thereafter a certificate for the 2500 shares of stock in
the Gold Mine Company was delivered to the defendant; that
on September 12, 1922, plaintiff was a registered owner
of the note, Chicago, though the note is questioned by

canceled a note for \$200.00 which he held against Erisman and by giving Erisman his check for \$1190.00. The check was endorsed by Erisman and it was paid the next day by the Colorado Bank upon which it was drawn. The note not having been paid, plaintiff brought the instant case in the Municipal Court of Chicago. The evidence further shows that on July 9, 1924, suit was brought on the note in the County Court of Denver, wherein L. Larson was the plaintiff and the defendant in the instant case was the defendant. Everett Owens was the attorney for plaintiff in the suit in Colorado, and he made an affidavit attached to the complaint filed in the Denver Court, wherein he swore that the note in question had been sold by Erisman, trustee, the payee of the note to L. Larson and that she was the owner of the note. In the instant case plaintiff testified that L. Larson, the plaintiff in the Denver suit, was his stenographer and that he brought the suit in her name for the reason that he thought he could obtain judgment in the Denver Court before the case would be reached in the Municipal Court of Chicago.

It was sought to be shown by the defendant that at the time he made the note in question he had a talk with Erisman wherein Erisman asked him to buy more stock in the Gold Mines Company and that he would sell the defendant 3500 shares of the treasury stock for \$500.00 cash and a note for \$1500.00 due in one year; that thereupon the defendant told Erisman that the Gold Mines

upon the defendant sold witness that the Gold Mine
cash and a note for \$100.00 due in one year; that there-
defendant 3000 shares of the Brewery stock for \$200.00
in the Gold Mine Company and that he would sell the
with witness whereas witness asked him to buy more stock
at the time he made the sale in question he had a false
It was sought to be shown by the defendant that
of Chicago.

Company then owed the defendant over \$2500.00, and therefore, the defendant would not be willing to pay the \$1500.00 note until the Gold Mines Company paid its then indebtedness to him; that Erisman then said "I will hold this note until maturity and not transfer it until the company has paid your note and we will have the note made out to myself, trustee." Counsel for the defendant then stated that in addition to the foregoing he expected to show that it was upon that condition that the note was given; that at that time the note did not have any revenue stamp upon it; that it was not an absolute delivery of the note, but was given to Erisman, trustee, as an incomplete delivery. He further offered to show that the Gold Mines Company was still indebted to the defendant. This evidence was all excluded on the theory that it could not affect plaintiff's rights since he was not present at the time. The defendant also offered to show that the Gold Mines Company had not filed documents with the Secretary of State of Illinois as the law requires where it is sought to sell Class "B" Securities in this State. This was likewise excluded. The jury were then instructed to find for the plaintiff.

The defendant contends that the court erred in excluding the evidence offered by him for the reason that under The Negotiable Instrument Act the offered evidence if received would have shown that the title to the note in question was defective at the time it was obtained by plaintiff and that if this were shown it was then incumbent upon plaintiff to show that he was a bona fide holder for value

Company then made the statement over \$2500.00, and there-
fore, the statement would not be willing to pay the \$2500.00.
now will the said bank company will let this statement-
now to say that statement then will I will let this case
until maturity and not transfer it until the company can
paid your note and we will have the note made out to up-
will, transfer. Counsel for the defendant then stated
that in addition to the foregoing he requested to have that it
was then established that the note was given, that
at that time the note did not have any return stamp upon
it; that it was not an absolute delivery to the note, but
was given to witness, transfer, as an absolute delivery.
He further offered to show that the said bank company
was still indebted to the defendant. This evidence was all
excluded on the theory that it was not effect of plaintiff's
rights since he was not present at the time. The defend-
ant also offered to show that the said bank company had
not filed documents with the Secretary of State of Illinois
as the law requires where it is subject to sell under the
provisions in this State. This was likewise excluded. The
jury were then instructed to find for the plaintiff.

The defendant contends that the court erred in
excluding the evidence offered by him for the reason that
under the negotiable instrument act the offered evidence
it would have shown that the title to the note in
question was defective at the time it was obtained by plain-
tiff and that if this were shown it was then incumbent upon
plaintiff to show that he was a bona fide holder for value

without notice. Sec. 55 of the Negotiable Instrument Act provides that the title of a person who negotiates a note is defective when it is negotiated in breach of faith or under circumstances as amounts to a fraud. And Sec. 56 of the Act provides that to constitute notice of an infirmity or defect in the title of a person negotiating a note, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. Sec. 52 of the same act defines a holder in due course as one who takes the instrument under the following conditions: (1) that the instrument is complete and regular on its face; (2) That he became holder before it was overdue, and without notice that it had been previously dishonored, if such was the fact. (3) That he took it in good faith and for value. (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

If we assume that the evidence offered by the defendant as to what was said between Erisman and the maker at and prior to the time of the execution of the note was admissible as tending to show that the title in Erisman was defective within the meaning of the statute, it would avail the defendant nothing in this court because the plaintiff in making out his case assumed the burden of proving that he was the holder in due course without notice. He testified that when he obtained the note from Erisman he had no notice of any defects on the part of the maker, and that he paid \$1190.00 for the note in addition to cancelling a note for \$200.00 which he held against Erisman. Nor do we think there was a

without notice. Sec. 25 of the Negotiable Instrument Act provides that the title of a person who negotiates a note is defective when it is negotiated in breach of faith or under circumstances amounting to a fraud. And Sec. 26 of the act provides that in negotiating a note, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that action in taking the instrument amounted to bad faith. Sec. 26 of the same act follows a holder in due course as one who takes the instrument under the following conditions: (1) That the instrument is complete and regular on its face; (2) That he became a holder before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) That he took it in good faith and for value; (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

It is assumed that the evidence offered by the defendant as to what was said between him and the maker of the note prior to the time of the execution of the note was admissible as tending to show that the title in the instrument was defective within the meaning of the statute, it would avail the defendant nothing in this court because the plaintiff is making out his case assuming the burden of proving that he was the holder in due course without notice. He testified that when he obtained the note from the maker he had no notice of any defects on the part of the maker, and that he paid \$100.00 for the note in addition to remitting a note for \$200.00 which he held against the maker. Now do we think there was

conditional delivery by the defendant of the note in question. In the case of Hell v. McDonald, 308 Ill. 329, cited by counsel for defendant, the promissory notes were made and delivered with the understanding that they would not take effect as promissory notes, but would later be surrendered to the maker upon the occurrence of future happenings. In the instant case the note was made and delivered to take effect as a valid promissory note and was to be paid by the defendant for the stock in the Gold Mines Company which he received. The only condition as disclosed by the offered evidence was that the payee of the note would not transfer it before maturity or until the company had paid the defendant the indebtedness which it then owed him. But the defendant further contends that plaintiff is not a bona fide holder for value because he was put upon notice when he received the note from Erisman; that it did not belong to Erisman because it was made payable to Erisman, Trustee; that the word "trustee" showed that there was a beneficiary who was the real owner of the note, and, therefore, plaintiff should have made inquiry in this regard. There are two reasons why this defense cannot be availed of here. One is that no such defense was interposed in the trial court. There was not even a suggestion of such a contention on the trial and it is elementary that such a point cannot be urged for the first time in a court of review. But there is another reason why the defense is unavailing. The cestui que trust - the beneficial owner, (if there were one) is making no complaint as was the fact

in the case of Henshaw v. State Bank, 239 Ill. 515, and cases cited. We do not know the terms of the trust agreement, if there was one. All that appears in the record is that it is said by counsel that the Gold Mines Company was a common law trust. There is no evidence in the record that the Gold Mines Company is not financially responsible, although defendant's counsel seems to contend such is the case. There is no evidence or offer of evidence of any fact that would show the financial standing of this concern.

The fact that plaintiff swore to a complaint filed in the suit in Colorado in which he stated that the note in suit was bought by Larson from the payee prior to his testimony on the stand in the instant case, does not warrant the contention that the case should have been submitted to the jury. So far as the instant case is concerned, we think it clear that plaintiff was the owner of the note; that he was a bona fide holder for value without notice, and that there was no defense interposed. In these circumstances, of course, the jury should have been directed to find for the plaintiff. There is no merit in the contention that the securities were class "D" securities within the Illinois law, and therefore the Gold Mines Company was required to file documents specified in the statute with the Secretary of State because there is not one word of evidence in the record nor was any offered tending in any manner to show that the stock sold to the defendant was of class "D" securities. People v. Gillett, 243 Ill. App. 41. In no event was this offered evidence any defense. McGregor

in the case of Winters v. Winters, 228 Ill. 411, and
said 411-4. It is not known the terms of the first
agreement, if there was one. All that appears in the
record is that it is held by counsel that the said first
agreement was a contract for stock. There is no evidence in
the record that the said first agreement is not financially
responsible, although defendant's counsel seems to contend
that in the case. There is no evidence or other of
evidence of any fact that would show the financial
condition of the company.
The fact that plaintiff seems to a contract
filed in the suit is Winters in which he stated that
the note is suit was bought by Winters from the payee bank
to his testimony on the stand is the lastest word, that
not without the contention that the case should have been
submitted to the jury. As far as the instant case is
concerned, we think it clear that plaintiff was the owner
of the note; that he was a bona fide holder for value
without notice, and that there was no defense interposed.
In these circumstances, of course, the jury should have been
directed to find for the plaintiff. There is no merit in
the contention that the question was one of "recovery"
within the Illinois law, and therefore the said Winters
was not tried to the issues specified in the statute with
the language of state because there is not one word of
evidence in the record nor was any offered tending in any
manner to show that the stock sold to the defendant was of
class "B" securities. Winters v. Winters, 228 Ill. 411, 412.
In no event was this offered evidence any defense. Winters

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v. Lamont, 245 Ill. App. 451.

The judgment of the Municipal Court of Chicago
is affirmed.

AFFIRMED.

TAYLOR, P.J. and THOMSON, J. CONCUR.

109 - 31238

THOMAS J. SHEEHAN,
Appellee,

v.

SOUTH-WEST TRUST & SAVINGS
BANK,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Monday, June 13, 1927.

MR. JUSTICE THOMPSON delivered the opinion of
the court.

By this appeal the defendant bank seeks to reverse
a judgment for \$2044.38, recovered against it in the Superior
Court of Cook County, by the plaintiff Sheehan.

The plaintiff was a depositor in the defendant
Bank. For some time Sheehan had been acquainted with a
man named Meister. The latter was connected in some way
with the United States Cold Storage Company. From time
to time, over a period of some months, Meister had brought
checks to Sheehan's place of business, and at his request
Sheehan had cashed them for him. All these checks were
drawn by the Cold Storage Company payable to different
individuals, and in each case the payee purported to have
endorsed the check in blank. According to the testimony
of Sheehan, he had known Meister for some time and had
supposed he was all right and he cashed the checks which
he presented without asking Meister to endorse them.
Sheehan then deposited them in his account in the defendant
bank, and in due course of business the Bank credited his
account with the amounts of the checks and Sheehan obtained the
benefit of these credits, as he issued his own checks against

3-17-1919

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THE UNITED STATES OF AMERICA
vs.
JAMES A. HENNING
Defendant.

Opinion filed Monday, June 13, 1927.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for \$2000.00, rendered against it in the Superior Court of Cook County, by the plaintiff, Graham.

The plaintiff was a depositor in the defendant's bank. For some time Graham had been acquainted with a man named Webster. The latter was connected in some way with the United States Gold Storage Company. From time to time, over a period of some months, Webster had brought checks to Graham's place of business, and as his request Graham had cashed them for him. All these checks were drawn by the Gold Storage Company payable to different individuals, and in each case the payee purported to have endorsed the check in blank. According to the testimony of Graham, he had known Webster for some time and had supposed he was all right and he cashed the checks which he presented without asking Webster to endorse them. Graham then deposited them in his account in the defendant's bank, and in the course of business the bank credited his account with the amounts of the checks and Graham obtained the benefit of these credits, as he issued his own checks against

his account.

In the fall of 1924, a representative of the Storage Company called at the defendant Bank with one or two of these checks and stated to Mr. Healy, president of the bank, that these checks he had with him, as well as a number of others, all bearing the endorsement "Thos. Sheehan" and all of which had passed through the defendant bank, contained the forged endorsements of the respective payees. Healy then called Sheehan in and advised him of the situation. The balance to Sheehan's credit in the bank at this time was \$2,040. Sheehan attempted to draw against that balance but the bank declined to permit him to do so, whereupon he consulted lawyers. A few days later Sheehan gave his lawyers his check, drawn on the defendant bank, for the amount of his balance, - \$2040. The payees of that check deposited it in their own bank, and when, in due course, it was presented to the defendant bank, the latter refused payment, whereupon the plaintiff brought this action in assumpsit, to recover the amount involved. The defendant bank defended the action brought by the plaintiff, on the ground, as stated in its affidavit of merits, that on November 5, 1924, the plaintiff "agreed with defendant that the amount then on deposit with defendant in plaintiff's account, to wit, \$2040.00, should be left there with the defendant as security until the demand for repayment" (of the alleged forged checks) "was settled or satisfied and that no part thereof should be withdrawn by plaintiff until such time; that the demand for repayment had not been settled or satisfied and that defendant is holding said sum and refused to honor the checks presented,

100 - 11222
His Honor.

In the fall of 1932, a representative of the
Storage Company called at the defendant bank with two
two of these checks and stated to Mr. Healy, president
of the bank, that these checks he had with him, as well
as a number of others, all bearing the endorsement
"John, Shoshon, and all of which had passed through
the defendant bank, contained the forged endorsements of
The respective payees. Healy then called on the
and advised him of the situation. The balance of Shoshon's
credit in the bank at this time was \$2,040. Shoshon attempted
to draw against that balance but the bank declined to permit
him to do so, whereupon he consulted lawyers. A few days
later Shoshon gave his lawyers his check, drawn on the
defendant bank, for the amount of his balance, - \$2,040.
The payee of that check deposited it in their own bank,
and when, in due course, it was presented to the defendant
bank, the latter refused payment, whereupon the plaintiff
brought this action in assumpsit, to recover the amount
involved. The defendant bank defended the action on the
by the plaintiff, on the ground, as stated in the affidavit
of defense, that on November 2, 1934, the plaintiff agreed
with defendant that the amount then on deposit with defendant
in plaintiff's account, to wit, \$2,040.00, should be left
there with the defendant as security until the demand for
repayment (of the alleged forged checks) was notified in
writing and that no part thereof should be withdrawn by
plaintiff until such time; that the demand for repayment
had not been notified on affidavit and that defendant is
holding said sum and refused to honor the checks presented.

as set forth in plaintiff's declaration, for the reasons aforesaid."

The record shows that after the case at bar was instituted by the plaintiff, the Cold Storage Company brought two actions, one against Sheehan and the other against the South-West Trust & Savings Bank. Both of these actions are based upon these same checks. At the time the case at bar was heard in the trial court, these cases were still pending.

The evidence submitted by the respective parties in the case at bar is in direct conflict. The president of the defendant bank testified that he first talked with the plaintiff about this matter on November 5, 1924, and at that time he told the plaintiff that he had heard about these checks from a representative of the Storage Company; that the latter claimed there were a lot of these checks involved and that he expected to get further information from the Storage Company within a few days, and that as soon as he did he would let Sheehan know; that he told Sheehan in this first conversation, that as these checks came in, the bank would have to charge them against Sheehan's account. Healy further testified that Sheehan again came to the bank "a few days afterward," at which time the bank had further information about these checks, and he then told Sheehan that it was going to amount to a lot of money and that: "We will have to make some arrangement here about this account. * * * What can you do about it?" and he said he did not know; that he then asked Sheehan if he could give the bank a bond, and he said he could not; and he then asked him if he had any real estate and he said he

did not, and he then told Sheehan that they would not pay out anything on Sheehan's account; and Sheehan said he needed some money, but Healy told him he could not let him have any and suggested that Sheehan see a lawyer. Healy testified that when he told Sheehan, in this conversation, that they would "have to hold the checks back and we will hold the money back," Sheehan agreed to it, saying, "All right." In the same conversation Healy said the bank might be put to some expense which they ought not to be called upon to stand, for if there was any neglect, it was between the Storage Company and Sheehan, so it would be up to Sheehan to pay whatever expense the bank was put to, and Sheehan said that was all right. Either on the day of this last conversation or a day or two later, Sheehan came to the bank and made an effort to cash his check for \$1800. and the bank declined to pay it. Healy testified that he told Sheehan at that time: "You know we have an arrangement on this account," and that Sheehan replied that "it was all right and the right thing to do."

A stenographer in the bank testified that she heard a conversation between Mr. Healy and Mr. Sheehan, in the early part of November, 1924, in which she heard Healy say that because of the large amount of the forged checks involved, he would have to hold the balance of Sheehan's account, "and Mr. Sheehan said it was all right."

The record contains two letters addressed to Sheehan and signed by Healy as president of the bank. The first is dated November 5, 1924, which is the date of the first conversation between these parties. In this letter Healy advises

did not, and he then told them that they would not pay
out anything on Shoben's account; and Shoben said he needed
some money, but he said he would not let him have any
and suggested that Shoben see a lawyer. He said that
when he told Shoben, in this conversation, that they would
"have to hold the check back and we will hold the money
back," Shoben agreed to it, saying, "All right." In the
same conversation Shoben said the bank might be put to some
expense which they ought not to be called upon to stand,
for if there was any liability, it was between the Shobens
company and Shoben, so it was up to Shoben to pay
whatever expense the bank was put to, and Shoben said that
was all right. Either on the day of this last conversation
or a day or two later, Shoben came to the bank and made an
effort to cash his check for \$1500, and the bank declined to
pay it. He said that he told Shoben at that time:
"I am sorry we have an arrangement on this account," and that
Shoben replied that "it was all right and the right thing

to do."

A stenographer in the bank testified that the board
of directors advised Mr. Shoben and Mr. Shoben, in the
early part of November, 1924, in which the board advised
that because of the large amount of the forged checks involved,
he would have to hold the balance of Shoben's account, and
Mr. Shoben said it was all right."

The record contains the following statement by Shoben
and signed by him as president of the bank. The list is
dated November 5, 1924, which is the date of the first con-
versation between these parties. In this latter conversation

Sheehan as to the details of two of these checks, "as per a conversation held with you today by the writer * * * We are advising you promptly so that you may be in a position to protect yourself." The second letter is dated November 12, 1924. At that time the plaintiff had made an unsuccessful effort to cash his check for \$1600 at the defendant bank, and the check for the full amount of the plaintiff's balance, drawn by him and made payable to his lawyers, had been presented to the defendant bank and the latter had refused payment on it. Healy testified that in his first conversation with Sheehan he told him he expected to get some further details about these checks shortly and would advise him of them as soon as he had them in hand. In this second letter of November 12, Healy said: "As per previous conversations and arrangements made with you, we herewith enclose a list of the checks," which the Storage Company claimed contained the forged endorsements of the payees, all of which also contained the endorsement of the plaintiff. This letter then went on to say: "We are sending you the list of the items in accordance with our arrangement, and we request that you give this matter your prompt attention and let us hear from you. If there are any other checks returned, we will advise your promptly."

The record also shows that on November 6, 1924, the plaintiff visited the defendant bank with one O'Sullivan, the latter being connected with the office of the plaintiff's lawyers, and on that occasion O'Sullivan had some conversation with Mr. Healy about the situation. O'Sullivan testified that they talked the matter over generally, discussed who would

Shedden as to the details of one of these checks, "as per a conversation held with you today by the writer." He is advising you promptly so that you may be in a position to protect yourself. The amount of the check is \$100.00. At that time the plaintiff had made an unsuccessful effort to cash his check for \$100.00 at the defendant bank, and the check for the full amount of the plaintiff's balance, drawn by him and made payable to his lawyers, had been presented to the defendant bank and the latter had refused to cash it. Healy testified that in his first conversation with Shedden he told him he expected to get some further details about these checks shortly and would advise him of them as soon as he had them in hand. In this second letter of November 13, Healy said: "As per previous conversations and arrangements made with you, we herewith enclose a list of the checks," which the foregoing summary stated were the failed payments of the payees, all of which also contained the endorsement of the plaintiff. This letter then went on to say: "We are sending you the list of the items in accordance with our arrangement, and we request that you give this matter your prompt attention and let us hear from you. If there are any other checks returned, we will advise you promptly."

The record also shows that on November 6, 1926, the plaintiff visited the defendant bank with one O'Sullivan, the latter being connected with the office of the plaintiff's lawyers, and as that session O'Sullivan had some conversation with Mr. Healy about the situation. O'Sullivan testified that they talked the matter over generally, discussed the

probably have to stand the loss, and that Mr. Healy expressed the opinion that the Storage Company had been negligent and would probably have to stand the loss themselves; that he, O'Sullivan, then said that Sheehan had told him the bank would not let him have his money and that Healy replied, "Well, I told him he had better leave the money here for a day or so." O'Sullivan further testified that in this conversation Healy said nothing about Sheehan giving the bank a bond or any protection of any other sort. Healy testified that in this conversation with O'Sullivan he asked him if Sheehan could give them a bond, and O'Sullivan looked at Sheehan, who was standing near, and the latter said he did not think he could. He also testified he told O'Sullivan they were holding Sheehan's account.

Sheehan denied that he ever told Healy it would be all right for the bank to hold the balance of his account until the matter of these checks was adjusted. He admitted that he was called over to the defendant bank and that he had a talk with Healy, who produced "a couple of checks from the U. S. Cold Storage Co;" that he admitted that his endorsements were on the checks; and that Healy said the witness could not draw out anything for a few days because the bank had been told there were more of these checks, whereupon, the witness said that would not do and that he would see his lawyer, which he promptly did. According to Sheehan's own testimony of this conversation, he made statements at that time which seem quite inconsistent with his contention that he was never willing to allow his deposit to remain until the matter of these checks was adjusted; and never consented that it should be done. We refer to the fact that

probably have to stand the loss, and that Mr. Healy expressed
the opinion that the money was not his. He said that he
would probably have to stand the loss himself; that he,
O'Donnell, then said that Healy had told him the bank
would not let him have the money and that Healy replied,
"Well, I told him he had better leave the money here for
a day or so." O'Donnell further testified that in this
conversation Healy was talking about Healy giving the
bank a bond or any provision of any other sort. Healy
testified that in this conversation with O'Donnell he
said that if Healy would give them a bond, and O'Donnell
looked at Healy, who was trembling now, and the latter
said he did not think he would. He also testified he told
O'Donnell they were holding Healy's account.
He then testified that he ever told Healy it would
be all right for the bank to hold the balance of the account
until the matter of these checks was adjusted. He testified
that he was called over to the Healy bank and that he
had a talk with Healy, who produced a couple of checks from
the U. S. Civil Service Co.; that he admitted that his endorse-
ments were on the checks; and that Healy said the witness
could not draw out anything for a few days because the bank
had been told there were several these checks, whereupon, the
witness said that would not do and that he would see his
lawyer, which he promptly did. According to Healy's con-
testimony of this conversation, he made statements at that
time which seem quite inconsistent with his contention that
he was never willing to allow his deposit to remain until
the matter of these checks was adjusted; and never con-
sented that it should be done. He refers to the fact that

Sheehan testified that when he went over to the bank and Healy mentioned this matter to him, he had two of these checks in his hands, and he asked Healy what they amounted to and Healy replied, "\$280 or \$300." Sheehan's testimony then is: "I said, 'All right, I have got \$2,000 in the bank here and I would like to draw \$1,000.'" His testimony is that Healy was unwilling that any of his account be drawn out and Sheehan asked him why he took that position and that Healy then mentioned that there were other checks involved. Following that, Sheehan's testimony is: "I said, 'the checks aren't here.' He said: 'You got two checks amounting to \$300.' I said: 'I have got \$2,000 in the bank.' I said: 'I need \$1,000.'" Whereupon, Healy said he would have to leave it there for a few days. Sheehan then testified he told Healy that would not do.

It seems clear that if Sheehan had always maintained the position that he was entitled to draw out the balance in his account, and at no time consent that it might remain in the bank, pending a determination of what was to be done about these forged checks, he would never have remarked to Healy, as he admits he did, to the effect, in substance, that the bank was protected as to these checks, as his balance was \$2,000 and the only checks which had turned up so far, amounted to \$300. This would seem to show that Sheehan had the question of the bank's protection in mind, which would not be natural, inasmuch as between the two parties to this case, the loss, if any, resulting from the cashing of these checks by Sheehan and his depositing them in his bank, should not fall on the latter.

Shoemaker testified that when he went over to the bank and
healy examined this matter to him, he had two of these
checks in his hands, and he asked Healy what they amounted
to and Healy testified, "THAT AT \$200." Shoemaker's testimony
then is: "I will, 'All right, I have got \$2,000 in the
bank now and I would like to have \$1,000." His testimony
is that Healy was unwilling that any of his account be drawn
out and Shoemaker asked him why he took that position and
Healy testified that there were other reasons
involved. Testimony that Shoemaker's testimony is: "I
said, 'The account isn't here,' he said: 'I've got two
checks amounting to \$200.' I said: 'I have got \$2,000
in the bank.' I said: 'I need \$1,000.' Whereupon,
Healy said he would have to leave it there for a few days.
Shoemaker then testified he told Healy that would not do.

It seems clear that if Shoemaker had always main-
tained the position that he was entitled to draw out the
balance in his account, and at no time amount that it
might remain in the bank, pending a determination of what
was to be done about these forged checks, he would never
have returned to Healy, as he admits he did, to the effect,
in substance, that the bank was protected as to these
checks, as his balance was \$2,000 and the only checks
which he turned up to him, amounted to \$200. This would
seem to show that Shoemaker had the question of the bank's
protection in mind, when he said, "I need \$1,000,"
as between the two parties to this case, the loss, if any,
resulting from the cashing of these checks by Shoemaker and his
depositing them in his bank, should rest fall on the latter.

In view of Sheehan's admission that he referred to the amount of his deposit, which indicated that the bank was protected, we feel that the finding of the trial court was against the manifest weight of the evidence. For that reason the judgment of the Superior Court is reversed and the cause is remanded to that court.

REVERSED AND REMANDED.

TAYLOR, P. J. AND O'CONNOR, J. CONCUR.

at present, as long as the state can do more at

The amount of his assets, which included both the cash and the value of the property, was estimated at the time of his death to be approximately \$100,000. The amount of his assets, which included both the cash and the value of the property, was estimated at the time of his death to be approximately \$100,000.

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1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 26

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127 - 31267

HYMEN MORINSKY,

Appellee,

v.

ISADORE KATZ,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Monday, June 13, 1927.

MR. JUSTICE THOMSON delivered the opinion
of the court.

By this appeal the defendant Katz seeks to
reverse a judgment for \$565.00 recovered against him in
the Municipal Court of Chicago by the plaintiff Morinsky.

The evidence shows that the parties to this
case entered into a contract of purchase and sale of a
piece of real estate, in which the plaintiff Morinsky
agreed to convey the property to the defendant Katz for
a consideration of \$62,000. The contract which the parties
executed was dated February 5, 1923. The property was to
be conveyed subject to a first mortgage of \$20,000, and a
second mortgage of \$14,000. It recited that the purchaser
had paid \$1,000 as earnest money. Of the balance, which
was to be paid when the deed was delivered, the contract
recited that the seller, Morinsky, agreed to accept
\$11,000 in second mortgage paper on other property.

The evidence establishes the fact that the payment
of \$1,000 as earnest money, was paid. The record contains
a check for \$250, signed by the defendant to the order of

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JULY - 1937

WITNESSES

Witness

7.

Witness

Witness

Opinion filed Monday, June 13, 1937.

Mr. JENNINGS has delivered the opinion

of the court.

It was agreed that the defendant had agreed to
execute a judgment for \$100,000, the amount agreed to in
the contract being the subject of the plaintiff's suit.

The evidence shows that the parties to this
case entered into a contract of purchase and sale of a
piece of real estate, in which the plaintiff's interest
agreed to convey the property to the defendant for
a consideration of \$100,000. The contract also provided
that the property was to be conveyed to the defendant
in a first mortgage of \$50,000, and a
second mortgage of \$50,000. It recited that the plaintiff
had paid \$5,000 as earnest money. Of the balance, which
was to be paid when the deed was delivered, the contract
recited that the seller, verbally, agreed to accept
\$11,000 in second mortgage notes on other property.

The witness testified that the fact that the payment
of \$1,000 as earnest money, was paid. The record contains
a check for \$100, signed by the defendant to the order of

the plaintiff, dated February 1, and another check for \$750, signed by the defendant, payable to the order of the plaintiff's lawyer, dated February 5, which was the date of the contract. The record further shows that these parties closed their deal on March 22, 1923. It also shows, without dispute, that when the parties, through their respective counsel, had figured up the various items of charge in the way of interest, insurance and so on, it was found that the balance due from the defendant Katz to the plaintiff Morinsky, in cash, was \$16,104.05. It is also shown without dispute that on March 22, 1923, the plaintiff got four checks from the defendant. Three of these were delivered late in the day, sometime after four o'clock, when the deal was passed and the deal closed. These checks consisted of a cashier's check for \$15,001.39; a check for \$500, signed "S. Katz & Co., Inc.," to the order of Isadore Katz; and another check for \$602.66, signed by the defendant's lawyer, one Goodman, and drawn to the order of the plaintiff and his wife. It is further shown, without dispute, that earlier on that day, either late in the forenoon or early in the afternoon, the defendant had sent another check to the plaintiff, for \$500, signed "S. Katz & Co. Inc.," and drawn to the order of Isadore Katz.

It will be seen that the sum of these checks turned over to the plaintiff by the defendant on March 22, 1923, was \$16,604.05, which is just \$500 more than was found to be due the plaintiff when the parties came to close the deal. The defendant took the position that he had overpaid the plaintiff \$500, and he, therefore, stopped payment on one of his \$500 checks. The plaintiff

The Plaintiff, dated February 1, and number check for
\$100, signed by the defendant, payable to the order of the
Plaintiff's lawyer, dated February 2, which was the date of
the payment. The money for the check was paid to the
Plaintiff's lawyer on March 21, 1931. It was shown, without
doubt, that when the money was paid, the defendant
intended, and figured up the various items of charge in the
way of interest, damages and so on, it was found that
the balance due from the defendant to the Plaintiff
was, in each, was \$10,100.00. It is also shown with-
out dispute that on March 22, 1931, the Plaintiff got four
checks from the defendant. Three of these were delivered
into the bank, sometime after four o'clock, when the bank
was closed and the door closed. These checks consisted of
a money order for \$10,000.00; a check for \$100, signed
"J. L. & Co., Inc.", to the order of Plaintiff's lawyer; and
another check for \$100.00, signed by the defendant's lawyer,
one thousand, and given to the order of the Plaintiff and
his wife. It is further shown, without dispute, that earlier
on that day, either late in the forenoon or early in the after-
noon, the defendant had sent another check to the Plaintiff,
for \$100, signed "J. L. & Co., Inc.", and given to the order
of Plaintiff's wife.

It will be seen that the sum of these checks
amounted to \$10,100.00, which is the balance due from
the defendant to the Plaintiff, and it was found that the
Plaintiff then the parties came
to close the deal. The defendant took the position that
he had overpaid the Plaintiff \$100, and so, therefore,
stopped payment on one of his \$100 checks. The Plaintiff

thereupon brought this action against the defendant to recover the amount of that check.

The plaintiff testified that the \$500 check he was suing on was the one he received as one of the three checks turned over to him when the deal was closed. In this he was corroborated by one Weinstein, who was the lawyer representing him in connection with this real estate transaction. The defendant, on the other hand, testified that the \$500 check given to the plaintiff when the deal was closed, had been cashed by him and that the check sued on was the one which had been sent over to the plaintiff earlier in the day. This position of the defendant was likewise corroborated by Goodman, who was acting as his lawyer in the deal. In our opinion, it makes no difference, as far as the decision of this case is concerned, whether the check being sued on was the one the plaintiff received earlier in the day or was the one he received when the deal was closed. In either event, it is entirely clear that the plaintiff received, in checks \$500 more than he was entitled to under the contract.

The record clearly shows that the plaintiff was right with regard to the check sued on. It was, as he stated, the check received as one of the checks turned over to him when the deal was closed, and not the check he had received earlier in the day. The record demonstrates that fact beyond peradventure of any doubt. These two \$500 checks, both dated March 22, 1923, and being the only checks of "S. Katz & Co., Inc.," of that date, involved here, bore consecutive numbers. One is numbered 4302 and the other is

thereupon brought this action against the defendant to

recover the amount of that check.

The plaintiff testified that the \$500 check

he was owing to him was the one he received on one of the
three checks turned over to him when the deal was closed.

In this he was corroborated by one Bernstein, who was
the lawyer representing him in connection with this deal.
Bernstein testified that the check was given to the plaintiff when
the deal was closed, and that he was the one who

received it. He testified that the check was given to him and that the
check was cashed on the day which had been agreed upon by

the plaintiff earlier in the day. This position of the
defendant was likewise corroborated by Bernstein, who was
acting as his lawyer in the deal. In his opinion, it

seems no difference, as far as the decision of this case
is concerned, whether the check being cashed on the day
the plaintiff received earlier in the day or was the one
he received when the deal was closed. In either event, it
is entirely clear that the plaintiff received, in cash,
\$500 more than he was entitled to under the contract.

The record clearly shows that the plaintiff was
right with regard to the check cashed on. It was, as he

stated, the check received on one of the checks turned over to
him when the deal was closed, and not the check he had up-

posed earlier in the day. The record demonstrates that the
plaintiff's testimony is correct, and that the defendant's

testimony is incorrect. Both dated March 22, 1934, and being the only checks of
"\$500.00" of that date, involved here, were
corrective measures. One is numbered 4108 and the other is

numbered 4303. Naturally, they were issued in that order - 4302 first and 4303 later. The check which the plaintiff is suing on is 4303, which was no doubt issued by the defendant after the other check. Furthermore, the other \$500 check numbered 4302, was certified by the bank on which it was drawn, on the day on which it was drawn - March 22, 1933. The testimony shows that the plaintiff received one of these checks before the close of banking hours, on March 22, and the other one considerably after the close of banking hours. It is of course apparent that the one which was certified on the day it was drawn, was the one received before banking hours closed. That is No. 4302. And the one on which the defendant succeeded in stopping payment was the one he gave after the close of banking hours on that day. That is No. 4303, on which the plaintiff is suing. That this is the case is further demonstrated by the fact that the testimony all shows that the check that was sent to the plaintiff earlier in the day, was sent through the respective lawyers of the parties, and it came into the plaintiff's possession through the hands of his lawyer, Weinstein. The check which is certified, being No. 4302, is drawn to the order of the defendant and it bears the following endorsements.

"Pay to the order of
Philip A. Weinstein
Isador Katz
Philip A. Weinstein
H. Korinsky."

The fact that it was thus clearly shown that the plaintiff was right about his contention that the check he was suing on was the one received when the deal was closed, and that the defendant was wrong in his contention

Exhibit 100, which was found in the car -
1000 first and 1000 later. The check with the plaintiff

is being on 10 1000, which was no longer issued by the
defendant after the other check. Furthermore, the other
check was numbered 1000, and was written by the name of John
it was drawn, on the day on which it was drawn - March 22, 1900.
The testimony shows that the plaintiff received one of these
checks before the check of banking house, on March 22, and the
other one immediately after the check of banking house. It
is at once apparent that the one which was received on the
day it was drawn, was the one received before banking house
closed. That is, the 1000, and the one of which the defendant
and succeeded in stopping payment was the one he gave after
the close of banking house on that day. That is No. 1000,
on which the plaintiff is suing. That this is the case is further
demonstrated by the fact that the testimony all shows that
the check that was sent to the plaintiff earlier in the day,
was sent through the respective lawyers of the parties, and
it came into the plaintiff's possession through the hands
of his lawyer, defendant. The check which is being paid
No. 1000, is drawn to the order of the defendant and it bears
the following endorsement,

Pay to the order of
William A. Volstead
Cashier Bank
William A. Volstead
S. H. Hunsicker,

The fact that it was then clearly shown that the
plaintiff was right about his contention that the check
he was suing on was the one received when the bank was
closed, and that the defendant was wrong in his contention

to the contrary, may account for the fact that the jury found the issues in plaintiff's favor.

But as already stated we are of the opinion that the question of whether the plaintiff was suing on the check he got in the morning or the one he got in the afternoon, has nothing to do with the merits of the case, for it is entirely clear that the check he got in the morning was turned over to him in connection with this deal, and when he received the three checks that were turned over to him in the afternoon, he was getting \$500 more than his contract called for. It is undisputed that no transaction took place between these parties except the purchase and sale of this property. It is not disputed that the balance due the plaintiff to close the deal on March 23, was \$16,104.05. It is also undisputed that he received \$16,604.05, in checks on that day. There is no contention that the balance of \$16,104.05 was arrived at by figuring check 4302 as a prior payment. The record shows the contrary.

While the plaintiff was on the stand, he was asked what the consideration was for the \$500 check numbered 4302, being the check he received in the earlier part of the day which he had had certified. His answer was unintelligible. He said: "Mr. Katz was supposed to give me more than that. He had to deposit \$1,000. He, of course, -- after the figures, -- he had all the checks, Mr. Weinstein, you see, he had the deposits; first deposit he had it too, and then turned me over all the checks from the deposit too." He was asked whether he got a \$1,000 check from Weinstein and he said he didn't remember, - "it was everything in that figure. He gave

to the contrary, my account for the last time is true.
I am, Sir, your obedient servant.

But as already stated we are of the opinion
that the question of whether the affidavit was sworn on the
oath he got in the morning or the one he got in the afternoon,
knows, has nothing to do with the merits of the case, for it
is entirely immaterial that the check he got in the morning was
turned over to him in connection with this deal, and when
he received the three checks that were turned over to him
in the afternoon, he was getting 1800 more than his own-
most called for. It is understood that no transaction took
place between these parties except the purchase and sale of
this property. It is not disputed that the balance due the
plaintiff to close the deal on March 22, was \$12,102.25.
It is also understood that he received \$12,800.00, in checks
on that day. There is no contention that the balance of
\$12,102.25 was arrived at by figuring checks then as a prior
payment. The record shows the contrary.

While the plaintiff was on the stand, he was asked
what the conversation was for the 1800 check numbered 1800,
being checked he received in the earlier part of the day which
he had had certified. His answer was unintelligible. He
said "Mr. Latt was supposed to give me more than that."
He had to deposit \$1,000.00, at once, -- after the fifteen,
-- he had all the checks, Mr. Weinstein, you see, he had the
deposited that amount he had it too, and then turned in
over all the checks from the deposit too. He was asked
whether he got a \$1,000 check from Weinstein and he said he
didn't remember, -- it was everything in that figure. He gave

me lots of checks, his own checks, and these checks, he gave me a lot of checks at that time, Mr. Weinstein, and he had this \$500. in the figures." He was then asked whether this \$500 was "included in the figures," and he said it was. Later he was again asked if he got a check for \$1,000 from Weinstein before he closed the deal and he again said he didn't remember, - "I told you he figured all the checks, whatever the amount is." He was then asked if this \$500 check that he received in the morning of March 22, was part of that \$1,000, and he answered: "It is supposed so." That it was not is clearly demonstrated, not only by the fact that the contract the parties executed on February 5, 1933 recited that the defendant had then paid that \$1,000, but also by the dates and amounts of the two checks heretofore referred to, one dated February 1, for \$250 and the other dated February 5, for \$750, one drawn to plaintiff's order and the other drawn to the order of his lawyer.

The plaintiff's lawyer, Weinstein, testified that the \$500 check which was delivered to the plaintiff the day the deal was closed, but prior to the hour it was closed, was delivered to him by the defendant's lawyer and then by him delivered to the plaintiff. He said that he did not know what that check was for, - "I had nothing to do with it." Goodman, claiming that the check sued on was the one he sent over to Weinstein, testified that it was sent over as part payment on the real estate contract. He further testified that after the deal was closed, the plaintiff came over to his office with the \$500 check, on which payment had been stopped, and asked for an explanation saying that he wouldn't

no lots of checks, his own checks, and those checks, he
gives us a lot of checks at that time, Mr. Weinstein, and
he had this \$500. In the ledger, he was then asked
whether this \$500 was "included in the ledger," and he
said it was. Later he was again asked if he got a check
for \$1,000 from Weinstein before he filed the deal and
he again said he didn't remember. - "I told you he figured
all the checks, whatever the amount is." He was then asked
if this \$500 check that he received in the morning of March
22, was part of that \$1,000, and he answered: "It is supposed
so." That it was not is clearly demonstrated, not only
by the fact that the contract the parties executed on Febru-
ary 2, 1935 recited that the defendant had then paid that
\$1,000, but also by the dates and amounts of the two checks
hereafter referred to, one dated February 11, for \$500 and
the other dated February 15, for \$500, and known to plaintiff's
under and the other given to the order of his father.

The plaintiff's lawyer, Weinstein, testified
that the \$500 check which was delivered to the plaintiff
the day the deal was closed, but prior to the time it was
closed, was delivered to him by the defendant's lawyer and then
by him delivered to the plaintiff. He said that he did not
know what that check was for. - "I had nothing to do with it."
Weinstein, claiming that the check must have been the one he sent
over to Weinstein, testified that it was sent over on a pay-
ment on the real estate contract. He further testified
that after the deal was closed, the plaintiff came over to
his office with the \$500 check, on which payment had been
stopped, and asked for an explanation saying that he wouldn't

have closed the deal unless he had received that check, adding: "And that is why Mr. Katz sent the \$500 over before we closed, otherwise I wouldn't have closed the deal." He further testified that the plaintiff told him that Katz was making enough money on the property and "he ought to give me \$500 more." The plaintiff further said at that time that he would make trouble if he didn't get the \$500 called for by that check. Weinstein further testified that when payment of the \$500 check, received by the plaintiff at the time of the deal, was refused, he went over to see Goodman and told him that the other \$500 check which his client Norinsky had received earlier in the day, being the check which was certified, had been given to the plaintiff by the defendant "as an inducement or special consideration to close the deal on that day, because he said that Mr. Katz had a buyer for more money and consequently this \$500 more was paid," and for that reason he told Goodman that the defendant should not have stopped payment on the \$500 check delivered at the time the deal was closed; and that Goodman replied to the effect that Norinsky had received the full amount of \$62,000 and "there was no need to give him any additional consideration." As to this conversation Goodman testified that Weinstein had stated that the \$500 check received by him in the morning, "was given as an extra consideration for closing the deal." It is entirely clear from all the testimony in the record that there was no consideration for the extra \$500 check the plaintiff managed to get into his possession. The consideration called for by the contract for the sale of his property, was received by him in full, entirely apart from this extra check.

have closed the deal unless he had received that money.
Selling "and that is why Mr. Lutz sent the \$500 away before
we closed, otherwise I wouldn't have signed the deal." He
further testified that the plaintiff told him that Lutz was
making enough money on the property and the money to give
me \$500 more. The plaintiff further said at that time that
he would give \$500 to Lutz if Lutz would give him \$500
by that time. The plaintiff further testified that when payment
of the \$500 check, received by the plaintiff at the time of
the deal, was refused, he went over to see Lutz and told
him that the other \$500 check which he signed yesterday
had remained earlier in the day, being the check which was
received, had been given to the plaintiff by the defendant
"as an inducement or special consideration to close the deal on
that day, because he said that Mr. Lutz had a paper for more
money and consequently this \$500 was not paid, and for that
reason he told Lutz that the defendant should not have
stopped payment on the \$500 check delivered at the time the
deal was closed; and that Lutz replied to the effect that
Lutz had received the full amount of \$50,000 and there
was no need to give him any additional consideration." He
in this conversation Lutz testified that Lutz had
stated that the \$500 check received by him in the morning
"was given as an extra consideration for closing the deal."
It is entirely clear from all the testimony in the record that
there was no consideration for the other \$500 check the plain-
tiff managed to get into his possession. The consideration
called for by the contract for the sale of his property, was
received by him in full, entirely apart from this extra check.

The plaintiff is suing for a second item of \$65.00, which was apparently included by the jury in finding the issues in his favor and assessing his damages at \$565.00. This second item is based on the contention of the plaintiff that he was entitled to receive a title guaranty policy, covering the title of the property involved in the second mortgage paper, which he was taking in part payment for his property. It was stipulated that the cost of this policy would be \$65. The evidence shows that when the parties came to close their deal, the plaintiff demanded such a policy and the defendant's lawyer called his attention to the fact that the contract made no provision for such a policy being delivered to the plaintiff by the defendant. The plaintiff thereupon refused to complete the transaction unless he was given the policy, whereupon, Goodman told him that if he would go ahead and complete the transaction, he would give him a letter agreeing to furnish him such a policy later. That was satisfactory to the plaintiff and Goodman prepared and signed and delivered to the plaintiff a letter saying that "in consideration of the consummation of the real estate deal," in question, "this is to advise you that I hereby agree to furnish a guaranty policy," - being the policy the plaintiff was insisting upon. The defendant contends that the plaintiff is not entitled to recover the item of \$65.00 because, (1) the evidence fails to show that Goodman had any authority to bind the defendant in an agreement to furnish the policy; (2) the evidence fails to show that the plaintiff had ever procured the policy or incurred any expense in ordering

... The plaintiff is suing for a refund of \$500.00, which was apparently included in the sum of \$1000.00, which was in his favor and covering all amounts of \$1000.00. This amount is based on the receipt of the plaintiff that he was entitled to receive a refund of \$500.00, covering the title of the property involved in the recent mortgage matter, which he was entitled to pay for his property. It was stipulated that the sum of this policy would be \$100. The evidence shows that when the parties came to effect their deal, the plaintiff was issued with a policy and the defendant's lawyer called his attention to the fact that the contract made no provision for such a policy being delivered to the plaintiff by the defendant. The plaintiff thereupon refused to complete the transaction unless he was given the policy, whereupon the defendant told him that if he would go ahead and complete the transaction, he would give him a letter agreeing to furnish him with a policy later. That was satisfactory to the plaintiff and Coburn signed and agreed and delivered to the plaintiff a letter saying that "in consideration of the consummation of the real estate deal," in which it is so stated that I hereby agree to furnish a "guaranty policy," - being the policy the plaintiff was requesting upon. The defendant contends that the plaintiff is not entitled to recover the sum of \$500.00 because (1) the evidence fails to show that Coburn had any authority to bind the defendant in an agreement to furnish the policy; (2) the evidence fails to show that the plaintiff had ever procured the policy or incurred any expense in obtaining

any such policy, and; (3) even assuming authority in Goodman, the promise to supply the policy was without consideration, as the plaintiff had entered into the contract to convey the property for a consideration which was fully stated in the contract and there was no mention of any such guaranty policy there. The first reason urged is untenable. Goodman was the attorney for the defendant in the sale of the property and the defendant was present at the time the plaintiff was making his demand and at the time Goodman prepared his letter and signed it and gave it to the plaintiff. As far as agency was concerned, the defendant would be bound. The other two reasons, however, are in our opinion well taken, and either of them would be sufficient to defeat this item of the plaintiff's claim.

The record shows that both parties submitted motions for directed verdicts, at the close of all the evidence and both motions were overruled. The one submitted in behalf of the defendant should have been allowed. For the reasons we have given, the judgment of the Municipal Court is, therefore, reversed.

JUDGMENT REVERSED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

any such policy, and (2) over assuming authority as a person,
the plaintiff has shown the policy was without consideration,
as the plaintiff has shown that the contract is merely
the property for a consideration which was fully stated in the
contract and there was no question at any time as to the policy
being. The first reason stated in the contract is that the
the plaintiff for the defendant in the case of the plaintiff
and the defendant was present at the time the plaintiff
was making this contract and as the defendant proposed this
contract and signed it and gave it to the plaintiff. As for as
agency was concerned, the defendant would be bound. The contract
for reasons, however, are in my opinion well known, and
either of them would be sufficient to defeat this line of
the plaintiff's claim.

The second reason that both parties submitted
was for dividing evidence, of the case of all the
evidence and both parties were overruled. The court
in behalf of the defendant should have been allowed. For
the reasons we have given, the judgment of the plaintiff
should be reversed, remanded.

REVEREND JUSTICE

WILLIAM, J. J. 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 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2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 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2727, 2728, 2729, 2730, 2731, 2732, 2733, 2734, 2735, 2736, 2737, 2738, 2739, 2740, 2741, 2742, 2743, 2744, 2745, 2746, 2747, 2748, 2749, 2750, 2751, 2752, 2753, 2754, 2755, 2756, 2757, 2758, 2759, 2760, 2761, 2762, 2763, 2764, 2765, 2766, 2767, 2768, 2769, 2770, 2771, 2772, 2773, 2774, 2775, 2776, 2777, 2778, 2779, 2780, 2781, 2782, 2783, 2784, 2785, 2786, 2787, 2788, 2789, 2790, 2791, 2792, 2793, 2794, 2795, 2796, 2797, 2798, 2799, 2800, 2801, 2802, 2803, 2804, 2805, 2806, 2807, 2808, 2809, 2810, 2811, 2812, 2813, 2814, 2815, 2816, 2817, 2818, 2819, 2820, 2821, 2822, 2823, 2824, 2825, 2826, 2827, 2828, 2829, 2830, 2831, 2832, 2833, 2834, 2835, 2836, 2837, 2838, 2839, 2840, 2841, 2842, 2843, 2844, 2845, 2846, 2847, 2848, 2849, 2850, 2851, 2852, 2853, 2854, 2855, 2856, 2857, 2858, 2859, 2860, 2861, 2862, 2863, 2864, 2865, 2866, 2867, 2868, 2869, 2870, 2871, 2872, 2873, 2874, 2875, 2876, 2877, 2878, 2879, 2880, 2881, 2882, 2883, 2884, 2885, 2886, 2887, 2888, 2889, 2890, 2891, 2892, 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3391, 3392, 3393, 3394, 3395, 3396, 3397, 3398, 3399, 3400, 3401, 3402, 3403, 3404, 3405, 3406, 3407, 3408, 3409, 3410, 3411, 3412, 3413, 3414, 3415, 3416, 3417, 3418, 3419, 3420, 3421, 3422, 3423, 3424, 3425, 3426, 3427, 3428, 3429, 3430, 3431, 3432, 3433, 3434, 3435, 3436, 3437, 3438, 3439, 3440, 3441, 3442, 3443, 3444, 3445, 3446, 3447, 3448, 3449, 3450, 3451, 3452, 3453, 3454, 3455, 3456, 3457, 3458, 3459, 3460, 3461, 3462, 3463, 3464, 3465, 3466, 3467, 3468, 3469, 3470, 3471, 3472, 3473, 3474, 3475, 3476, 3477, 3478, 3479, 3480, 3481, 3482, 3483, 3484, 3485, 3486, 3487, 3488, 3489, 3490, 3491, 3492, 3493, 3494, 3495, 3496, 3497, 3498, 3499, 3500, 3501, 3502, 3503, 3504, 3505, 3506, 3507, 3508, 3509, 3510, 3511, 3512, 3513, 3514, 3515, 3516, 3517, 3518, 3519, 3520, 3521, 3522, 3523, 3524, 3525, 3526, 3527, 3528, 3529, 3530, 3531, 3532, 3533, 3534, 3535, 3536, 3537, 3538, 3539, 3540, 3541, 3542, 3543, 3544, 3545, 3546, 3547, 3548, 3549, 3550, 3551, 3552, 3553, 3554, 3555, 3556, 3557, 3558, 3559, 3560, 3561, 3562, 3563, 3564, 3565, 3566, 3567, 3568, 3569, 3570, 3571, 3572, 3573, 3574, 3575, 3576, 3577, 3578, 3579, 3580, 3581, 3582, 3583, 3584, 3585, 3586, 3587, 3588, 3589, 3590, 3591, 3592, 3593, 3594, 3595, 3596, 3597, 3598, 3599, 3600, 3601, 3602, 3603, 3604, 3605, 3606, 3607, 3608, 3609, 3610, 3611, 3612, 3613, 3614, 3615, 3616, 3617, 3618, 3619, 3620, 3621, 3622, 3623, 3624, 3625, 3626, 3627, 3628, 3629, 3630, 3631, 3632, 3633, 3634, 3635, 3636, 3637, 3638, 3639, 3640, 3641, 3642, 3643, 3644, 3645, 3646, 3647, 3648, 3649, 3650, 3651, 3652, 3653, 3654, 3655, 3656, 3657, 3658, 3659, 3660, 3661, 3662, 3663, 3664, 3665, 3666, 3667, 3668, 3669, 3670, 3671, 3672, 3673, 3674, 3675, 3676, 3677, 3678, 3679, 3680, 3681, 3682, 3683, 3684, 3685, 3686, 3687, 3688, 3689, 3690, 3691, 3692, 3693, 3694, 3695, 3696, 3697, 3698, 3699, 3700, 3701, 3702, 3703, 3704, 3705, 3706, 3707, 3708, 3709, 3710, 3711, 3712, 3713, 3714, 3715, 3716, 3717, 3718, 3719, 3720, 3721, 3722, 3723, 3724, 3725, 3726, 3727, 3728, 3729, 3730, 3731, 3732, 3733, 3734, 3735, 3736, 3737, 3738, 3739, 3740, 3741, 3742, 3743, 3744, 3745, 3746, 3747, 3748, 3749, 3750, 3751, 3752, 3753, 3754, 3755, 3756, 3757, 3758, 3759, 3760, 3761, 3762, 3763, 3764, 3765, 3766, 3767, 3768, 3769, 3770, 3771, 3772, 3773, 3774, 3775, 3776, 3777, 3778, 3779, 3780, 3781, 3782, 3783, 3784, 3785, 3786, 3787, 3788, 3789, 3790, 3791, 3792, 3793, 3794, 3795, 3796, 3797, 3798, 3799, 3800, 3801, 3802, 3803, 3804, 3805, 3806, 3807, 3808, 3809, 3810, 3811, 3812, 3813, 3814, 3815, 3816, 3817, 3818, 3819, 3820, 3821, 3822, 3823, 3824, 3825, 3826, 3827, 3828, 3829, 3830, 3831, 3832, 3833, 3834, 3835, 3836, 3837, 3838, 3839, 3840, 3841, 3842, 3843, 3844, 3845, 3846, 3847, 3848, 3849, 3850, 3851, 3852, 3853, 3854, 3855, 3856, 3857, 3858, 3859, 3860, 3861, 3862, 3863, 3864, 3865, 3866, 3867, 3868, 3869, 3870, 3871, 3872, 3873, 3874, 3875, 3876, 3877, 3878, 3879, 3880, 3881, 3882, 3883, 3884, 3885, 3886, 3887, 3888, 3889, 38

245 I.A. 620 #1

174 - 31306
175 - 31307
31 - 31622

JOSEPH BAUNHUK, et al,
Appellants,
v.
PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY

LOUIS NAROWETZ, ET AL,
Appellees,
v.
ALFRED CLOVER, et al,
Appellants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

LOUIS NAROWETZ, et al
Defendants in Error,
v.
PUBLIC LIFE INS. CO., a corp. et al,
Plaintiffs in Error.

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

Opinion filed Monday, June 13, 1927.

MR. JUSTICE THOMSON delivered the opinion
of the court.

Louis Narowetz and others, all stockholders of the Public Life Insurance Company, filed their bill in equity for the appointment of a receiver of the Insurance Company and for an injunction, and praying that a purported election of directors of the Company, held on October 17, 1924, be declared illegal and void. A receiver was appointed. Shortly thereafter, the defendants filed their answer. There were several references to masters in chancery; protracted hearings before the masters; arguments before the chancellor on the question of confirmation of the masters' reports; a final decree entered by the chancellor and a number of

2451.A. 620

176 - 1100
178 - 1100
21 - 1100

UNITED STATES
DISTRICT COURT
SOUTHERD DISTRICT

LOUIS KAMMERT, et al.
Plaintiffs
vs.
THE STATE OF ILLINOIS
Defendant

UNITED STATES
DISTRICT COURT
SOUTHERD DISTRICT

LOUIS KAMMERT, et al.
Plaintiffs
vs.
ALLIANCE MOTORS, et al.
Defendants

UNITED STATES
DISTRICT COURT
SOUTHERD DISTRICT

LOUIS KAMMERT, et al.
Plaintiffs
vs.
THE STATE OF ILLINOIS
Defendant

Opinion filed Monday, June 18, 1937.

MR. JUSTICE THOMAS delivered the opinion

of the court.

LOUIS KAMMERT and others, all stockholders of the
Kammert Life Insurance Company, filed suit to enjoin
for the appointment of a receiver of the Insurance Company
and for an injunction, and praying that a receiver be appointed
of directors of the Company, held on October 17, 1936, he
declared illegal and void. A receiver was appointed. Shortly
thereafter, the defendants filed their answer. There
were several references to matters in controversy; presented
before the master; arguments before the chancellor
on the question of continuation of the master's report;
a final decree entered by the chancellor and a number of

incidental orders. Case No. 31306 in this court is an appeal by certain respondents from orders finding them to be in contempt of court and assessing certain fines against them by reason thereof. Case No. 31307 is an appeal by all the defendants except five, from an order of the chancellor, taxing certain costs against the defendants. The five defendants referred to, not having perfected their appeal from the order taxing costs, sued out a writ of error to review that order, and the latter is case No. 31322 in this court. The three cases were here consolidated for hearing.

The complainants filed their bill on October 23, 1924, against the Public Life Insurance Company, to which we shall refer as the Insurance Company, and those claiming to be its directors. Complainants alleged that they were the owners of upwards of 100,000 shares out of a total of 500,000 shares of the stock of the Insurance Company. It was alleged that at the annual meeting of the stockholders, held the previous February, fifteen directors were elected, of whom eight are among the complainants in this case.

From the allegations in the bill of complaint, it appears that the defendant Clover had been chiefly instrumental in promoting and organizing the Insurance Company and that the complainants had been persuaded to join with him in that regard, having confidence in his integrity and ability; that by reason of their confidence in him, he was permitted to control and manage the Insurance

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175 - 175

independent order. Case No. 1122 in this court is an
appeal by certain respondents from orders rendered when
to be in contempt of court and concerning certain issues
against them by certain respondents. Case No. 1122 is an
appeal by all the respondents against the orders rendered
of the respondents, taking certain orders against the
defendants. The five respondents referred to, not having
permitted their appeal from the order taking effect, were
out a writ of error to review that order, and the latter
in case No. 1122 in this court. The three cases were
here consolidated for trial.

The respondents filed their bill on October
11, 1922, against the Public Life Insurance Company, to
which we shall refer as the Insurance Company, and those
claiming to be its directors. Complaints alleged that
they were the owners of upwards of 100,000 shares out of
a total of 200,000 shares of the stock of the Insurance
Company. It was alleged that at the annual meeting of the
stockholders, held the previous February, fifteen directors
were elected, of whom eight are among the complainants
in this case.

From the allegations in the bill it appeared
that the Insurance Company had been established
in accordance with the laws of the Insurance
Company and that the respondents had been permitted to
join with him in that regard, having confidence in his
integrity and ability; that by reason of their confidence
in him, he was permitted to control and manage the Insurance

Company from the time of its organization until the summer of 1933, when complainants first learned that he was conducting the affairs of the Insurance Company for his own benefit rather than that of the stockholders or policy holders; and that he was misusing the funds of the Insurance Company; whereupon, complainants caused his removal from the management and control of the company.

It further appears from the allegations in the bill that during the time Glover was in charge and control of the Insurance Company's business, he caused another corporation to be organized, known as the Public Agency Company, in which he retained such a stock interest as to dominate and control that company. Glover became president of this company and it was alleged that no stockholders' or directors' meetings had been called or held since 1931. Complainants alleged that the Agency Company had no assets and that Glover caused it to be organized for the purpose of having it act as the fiscal agent of the Insurance Company in the sale of the stock of the latter company and also to act as the sole agent of the Insurance Company in the matter of the sale of insurance policies and collecting of premiums thereon. It was alleged that while Glover was in control of both companies he caused a contract to be entered into between them under which the Agency Company was designated as the sole agent for the sale of the Insurance Company's stock on which it was to receive a commission of 25 per cent, which the complainants alleged was in excess of the amount allowed by the laws of this state in connection with such transactions. Complainants alleged that when the Insurance Commissioner of Illinois learned of the

Company from the time of its organization until the summer of 1911, when complaints first became known to the public. During the entire time of the insurance company's existence, the public has been aware of the fact that the company was controlled by the management and control of the company. It further appears from the allegations in the bill that during the time Glover was in charge and control of the Insurance Company's business, he caused another corporation to be organized, known as the Public Agency Company, in which he retained such a great interest as to dominate and control that company. Glover became president of this company and it was alleged that no stockholders or directors' meetings had been called or held since 1911. Complaints alleged that the agency company had no assets and that Glover caused it to be organized for the purpose of having it act as the local agent of the Insurance Company in the sale of the stock of the latter company and also to act as the sole agent of the Insurance Company in the matter of the sale of insurance policies and collecting of premiums thereon. It was alleged that while Glover was in control of both companies he caused a contract to be entered into between them under which the agency company was designated as the sole agent for the sale of the Insurance Company's stock on which it was to receive a commission of 25 per cent, which the complainants alleged was in excess of the amount allowed by the laws of this state in connection with such transactions. Complainants alleged that when the Insurance Commissioner of Illinois learned of the

existence of this contract, he directed that the Agency Company return to the Insurance Company \$100,000, being the amount which the Agency Company had collected in excess of commissions at the rate of 15 per cent, which was the rate allowed by law to be paid on such transactions. It was further alleged that the defendant Glover pretended to comply with that order of the Insurance Commissioner, by having a check of the Agency Company for \$100,000 issued and placed in the possession of the Insurance Company, but that he never had this check deposited in the bank by the Insurance Company; and it was alleged that the fact is that the check was of no value. It is further alleged that he thereafter substituted notes of the Agency Company for its check, which have never been paid and which he and the Agency Company refused to pay, claiming that they were given without consideration. Complainants alleged that these notes did not come to their knowledge until after Glover was removed from the management of the Insurance Company in August, 1933. It was further alleged that after Glover was removed from control of the Insurance Company the complainants caused the Company's books to be audited, by a firm of certified public accountants, whereupon it was discovered that Glover had charged against and collected from the Insurance Company various amounts, on diverse pretexts, all of which were without warrant and authority, and that the total amount of these illegal and improper charges and withdrawals was in excess of \$200,000, and that as a result of them Glover was indebted to the Insurance Company to that extent; that when this situation was discovered, the complainants as directors of the Insurance Com-

pany caused a bill for an accounting to be filed on its behalf, against Glover and the Agency Company, and that this suit was still pending at the time of the filing of the bill in the case at bar but that the defendants, claiming to be the duly constituted directors of the Insurance Company, had instructed the lawyers in charge of that litigation to dismiss it, on motion of the Insurance Company; and that consequently the Insurance Company and its stockholders will lose all benefit and advantage of that suit unless a receiver is appointed to take charge of the affairs and assets of the Insurance Company.

The complainants alleged that after the election of directors in February 1924, Glover conspired with certain of the defendants whose names are set out in the bill, and with other stockholders of the Insurance Company, for the purpose of regaining control of that company and bringing about the reinstatement of himself and his associates in offices where they would be in a position to use the funds of the Insurance Company for their own use and benefit and to the detriment and jeopardy of the stockholders and policy holders of the Insurance Company; and in that connection, and to accomplish that end, immediately after the election held in 1924, the defendants in the case at bar charged that their election was not legally conducted, and certain of the defendants caused a bill to be filed in the Superior Court of Cook County, against those who had been declared elected as directors at that meeting, praying that they be enjoined from acting as such directors and that a meeting of the stockholders of the Insurance Company be called for the

many caused a bill for an accounting to be filed on the
behalf, against Glover and the Insurance Company, and that this
bill was still pending at the time of the filing of the bill in
the case at bar but that the defendants, claiming to be the
only constituted directors of the Insurance Company, had
instructed the lawyers in charge of their litigation to dis-
miss it, on motion of the Insurance Company, and that
immediately the Insurance Company and its stockholders
will lose all benefit and advantage of that suit unless
a receiver is appointed to take charge of the affairs and
assets of the Insurance Company.

The defendants alleged that after the election
of directors in February 1904, Glover conspired with certain
of the defendants whose names are set out in the bill, and
with other stockholders of the Insurance Company, for the
purpose of negotiating control of that company and bringing
about the resignation of himself and his associates
in office whom they would be in a position to sue for
damages if the Insurance Company for their own use and benefit
and to the detriment and jeopardy of the stockholders and
policy holders of the Insurance Company, and in that connection,
and to accomplish that end, immediately after the election
held in 1904, the defendants in the case at bar charged
that their election was not legally conducted, and certain
of the defendants caused a bill to be filed in the Superior
Court of Cook County, against those who had been declared elect-
ed directors of that meeting, praying that they be enjoined
from acting as such directors and that a meeting of the
stockholders of the Insurance Company be called for the

purpose of holding an election, and that such election be held under the supervision of the court. Complainants alleged further that answers were duly filed to that bill and a reference was had to a master, and that after hearings, the master submitted his report, recommending that the bill be dismissed for want of equity; and that while that litigation was in that state and before a hearing had been had on the master's report, certain of the defendants, who were under the domination and control of Clover, caused a notice to be sent out to the stockholders of the Insurance Company, calling a special meeting of the stockholders to be held on September 16, 1924, for the purpose of electing directors. The bill alleged further that the proceedings in equity, brought by the defendants, in which they attacked the validity of the election of February, 1924, were still pending and undisposed of at the time of the filing of the bill in the case at bar.

The complainants further alleged in the bill filed in this case, that on September 15, 1924, a bill was filed in the name of the Insurance Company against those who had sent out the notices calling a meeting for September 16, asking that the court enter an injunction order against the holding of that meeting. Issues were joined on this last bill referred to, and a reference was had to a master, who, after a hearing, submitted his report finding that the election of February, 1924, had been illegal and recommending that the bill seeking to enjoin the holding of the election called for September 16, be dismissed for want of equity; and that this recommendation was followed by the chancellor and the bill was dismissed. Owing to a temporary restraining

purpose of holding an election, and that such election be held under the supervision of the court. Defendant also alleged further that answers were duly filed to said bill and a reference was had to a master, and that after hearing, the master submitted his report, recommending that the bill be dismissed for want of equity and that said litigation was in that state and before a hearing had been had on the master's report, wherein the defendants, who were under the domination and control of plaintiff, caused a notice to be sent out to the holders of the Insurance Company, calling a special meeting of the stockholders to be held on September 18, 1904, for the purpose of electing directors. The bill alleged further that the transaction in equity, brought by the defendants in which they attacked the validity of the election of February, 1904, were still pending and undischarged at the time of the filing of the bill in the case at bar.

The complaint further alleged in the bill that in this case, that on September 18, 1904, it will be filed in the case of the Insurance Company against the said bill and that the notice calling a meeting for September 18, calling that the court enter an injunction order against the holding of that meeting. Answers were filed on this last bill returned by, and a reference was had to a master, who, after a hearing, submitted his report stating that the election of February, 1904, had been illegal and recommending that the bill seeking to enjoin the holding of the election called the September 18, be dismissed for want of equity, and that this recommendation was followed by the court and the bill was dismissed. Owing to a temporary restraining

order issued in connection with the litigation just referred to, the election called for September 16, 1934, was postponed to October 17, 1934.

Complainants alleged further that they procured proxies representing more than 320,000 shares of stock of the Insurance Company, authorizing them to vote said shares at the meeting called for September 16, and, pursuant to the provisions of the by-laws of the Insurance Company, they filed these proxies with the secretary of the company more than ten days prior to that date. It is further alleged that in furtherance of the scheme of Glover and his associates to regain control of the Insurance Company, they claimed that they had procured proxies for more than 350,000 shares of the company's stock, authorizing them to vote those shares at the meeting of September 16, but that none of these proxies were filed with the secretary of the company, as required by the provisions of the by-laws of the company, and the defendants refused to permit anyone to examine any of these proxies they claimed to have in their possession.

It was further alleged that pursuant to the notices which had been sent out by Glover and his associates, the purported meeting of the stockholders of the Insurance Company was held on October 17, and that at that meeting approximately 100 individuals were present, about 75 of whom were allied with the Glover faction and the balance with the complainants; and that at that meeting Glover and his associates succeeded in preventing complainants from having any representative appointed as a member of the committee

order issued in connection with the litigation, was referred to, the election called for September 16, 1934, was postponed to October 17, 1934.

Complainants alleged further that they procured proxies representing more than 50% of the stock of the Insurance Company, authorizing them to vote with shares at the meeting called for September 16, and, pursuant to the provisions of the by-laws of the Insurance Company, they filed these proxies with the secretary of the company more than ten days prior to that date. It is further alleged that in furtherance of the scheme of Glover and his associates to regain control of the Insurance Company, they claimed that they had procured proxies for more than 500,000 shares of the company's stock, authorizing them to vote those shares at the meeting of September 16, but that none of these proxies were filed with the secretary of the company, as required by the provisions of the by-laws of the company, and the defendants refused to permit anyone to examine any of these proxies they claimed to have in their possession.

If we further alleged that pursuant to the notice which had been sent out by Glover and his associates, the purported meeting of the stockholders of the Insurance Company was held on October 17, and that at that meeting approximately 100 individuals were present, about 75 of whom were allied with the Glover faction and the balance with the opposite faction, and that at that meeting Glover and his associates attempted to reverse the results of the election and reorganize the company as a matter of the consolidated

to pass on proxies. It was alleged that at this meeting the complainants who were present represented, in person and by proxy, over 280,000 shares of the stock of the Insurance Company of a total of 500,000 shares, and if they had been permitted to vote the shares of stock so represented by individuals present and by proxy, they would have elected their directors who were then holding office pursuant to the prior election in February, but that in order to carry out their scheme, Glover and his associates refused to permit the complainants to vote either the stock represented in person or to vote the proxies which they had, while they themselves voted their own stock and the proxies they claimed to hold, whereupon, they declared their candidates elected to the office of director of the company. It was further alleged that in order to carry out their scheme, Glover and his associates had certain individuals present who claimed to be deputy sheriffs of Cook County, but who, upon later inquiry, were found not to be deputies, and that these persons threatened complainants and their friends, and finally forcibly ejected them from the building where the election was being conducted. It was also alleged that Glover and his associates had another person present, for the same purpose, who claimed to be a representative of the United States District Attorney, and who threatened certain of the complainants with Federal prosecution if they did not comply with Glover's demands, but upon later inquiry it was found that this person was without any such authority as he claimed to possess. It was alleged that immediately following this purported election of October 17, 1934, the defendants caused the locks on the doors of the building in Chicago, owned by

to have on premises. It was alleged that at this meeting the complainants who were present represented, in person and by proxy, over 250,000 shares of the stock of the insurance company, of a total of 500,000 shares, and it they had been permitted to vote the shares of stock so represented by individuals present and by proxy, they would have elected their directors who were then holding office pursuant to the prior election in February, but that in order to carry out their scheme, Glover and his associates refused to permit the complainants to vote either the stock represented in person or to vote the proxies which they had, while they themselves voted their own stock and the proxies they obtained to hold, whereas, they also elected their candidates elected to the office of directors of the company. It was further alleged that in order to carry out their scheme, Glover and his associates had certain individuals present who claimed to be deputy sheriffs of Cook County, but who, upon investigation, were found not to be deputies, and that these persons threatened complainants and their friends, and finally forcibly ejected them from the building where the election was being conducted. It was also alleged that Glover and his associates had another person present, for the same purpose, who claimed to be a representative of the United States District Attorney, and who threatened certain of the complainants with Federal prosecution if they did not comply with Glover's demands, but upon later inquiry it was found that this person was without any such authority as he claimed to possess. It was alleged that immediately following this purported election of October 17, 1924, the defendants caused the locks on the doors of the building in Chicago, owned by

the Insurance Company and in which it conducts its business, to be changed and that they forcibly ejected from the building all those affiliated with the complainants, and they seized and at the time the bill was filed were in possession of, all the books and records of the Insurance Company.

Complainants alleged further that at the time of this purported meeting in October, a suit was pending in the Municipal Court of Chicago, wherein the Insurance Company was plaintiff and one Zilligen was defendant, brought to enforce the collection of two notes aggregating \$5,000 in amount; that Zilligen claims he gave these notes to Glover in payment of the purchase price of certain shares of stock in the Insurance Company and that Glover never delivered the certificates to him, and further, that he had paid the notes to Glover. It was further alleged that at the meeting of October 17, Zillinger was present aiding and abetting Glover and his associates in depriving complainants of their legal right to vote both the stock they owned personally and that for which they held proxies; and it was alleged that Glover and any board of directors he controls will not press the litigation, seeking the collection of the Zilligen notes, and that the right of the Insurance Company in that connection will be lost to the company if it is compelled to act through Glover and his associates.

It was further alleged that at the time of the purported meeting in October, the defendant Baumruk was indebted to the Insurance Company in the sum of \$2,000 and interest, to secure which he had given a mortgage; that

said debt was past due and the Insurance Company had caused a bill to be filed to foreclose the mortgage; that Clover and his associates had caused Baumruk to be elected a director of the Insurance Company at the October meeting and that the directors, claiming to have been elected at that meeting, were not now in a position to pursue their litigation against Baumruk.

It was further alleged that during the time Clover had been in control of the affairs of the Insurance Company, he caused certain shares of the capital stock of that company to be sold to some thirty different individuals and received payment therefor but failed to deliver the certificates representing the stock so sold; that after all the stock of the company had been sold he caused certificates to be issued to seventeen other persons, calling for an aggregate of 165 shares; that he caused certain certificates of stock which had been issued, to be cancelled without the authority of the owners, and in lieu thereof he caused to be issued to the Public Agency Company, which he dominated, another certificate calling for 165 shares of the Insurance Company's stock, and that he then caused the latter certificate to be marked cancelled on the stock books of the Insurance Company, to show that the stock hereinabove referred to as having been sold to 17 different persons was transferred to them from the shares included in the certificate which had been issued to the Agency Company, as a result of all of which the Insurance Company was not now in a position to deliver to persons ^{who} purported to be entitled to stock, proper certificate

who

therefor; and it was further alleged that the consideration which had been paid by these individuals who had claims against the Insurance Company for stock, had never been paid over to the company. The bill refers to other stock transactions in connection with which Glover is alleged to have entered into certain obligations which the company is not in a position now to carry out.

The complainants further alleged that the defendants, claiming to have been elected directors and officers of the Insurance Company as a result of the October meeting will not attempt to collect funds due the Insurance Company from Glover or his associates or the Agency Company or anyone affiliated with them, and that these defendants have already attempted to prevent the collection of certain accounts due the Insurance Company; that they had signed a communication to attorneys representing the Insurance Company, advising them as to those who claimed to have been elected directors and officers of the Company and directing said attorneys to immediately withdraw all suits in their hands in which they purported to represent the Insurance Company, and these notices further discharged the attorneys from further service in behalf of the Company. It was further alleged that the litigation pending against Glover and the Agency Company should be prosecuted and that if the defendants are allowed to continue in control of the Insurance Company, the benefit of this litigation will be lost to the stockholders of the Insurance Company, and that the same is true with regard to the Baumruk and Ellinger litigations, "all of which will seriously impair

thereafter and it was further alleged that the respondents
then which had been paid by those individuals who had
brought against the Insurance Company for recovery and were
been paid over to the company. The bill refers to other
such respondents in connection with which there is
alleged to have entered into certain obligations which
the company is not in a position now to carry out.

The complainants further alleged that the defendant
acted, claiming to have been elected directors and officers
of the Insurance Company as a result of the general meeting
will not attempt to collect funds due the Insurance Company
from either of its subsidiaries or the Equity Company or anyone
affiliated with them, and that these defendants have already
attempted to prevent the collection of certain accounts due
the Insurance Company; that they had signed a communication
to attorneys representing the Insurance Company, advising
them as to those who claimed to have been elected directors
and officers of the company and directing said attorneys
to immediately withdraw all suits in their hands in which they
purported to represent the Insurance Company, and those parties
together directed the attorneys from further service in behalf
of the company. It was further alleged that the litigation
pending against them and the Equity Company should be pre-
sented and that if the defendants are allowed to continue
in control of the Insurance Company, the benefit of this bill
will be lost to the stockholders of the Insurance Com-
pany, and that the same is true with regard to the Insurance
and Affiliated Companies, all of which will seriously injure

the capital and assets" of the Insurance Company. It was alleged that there are upwards of 8,000 policy holders in the Insurance Company, carrying insurance aggregating \$7,000,000, and that for over a year the Agency Company has been collecting premiums on approximately \$3,000,000 of this insurance and has refused to render a statement of their collections, and has failed to pay over to the Insurance Company any part of the sums so collected, and it is impossible for the Insurance Company to know on just what policies the premiums have been paid. It was alleged that the Insurance Company is required by law to create certain reserves to be invested at not less than 3½ per cent, as a protection to the policy holders; that these reserves are created and maintained from premium payments as they are made; that having no knowledge of the premiums paid to the Agency Company, the Insurance Company was obliged to carry, as lapsed, on its books a large amount of insurance upon which it was known premiums had been paid to the Agency Company; that failing to receive these premiums from the Agency Company, the Insurance Company was not in a position to create the reserves required by law for the protection of its policy holders, and it was alleged on information and belief, that the premiums so collected by the Agency Company and not turned over to the Insurance Company, aggregate more than \$50,000, and by reason of this situation the Insurance Company has not sufficient assets upon which to realize \$50,000 or any substantial portion thereof, by reason of the insolvency of the Agency Company and Clover. It was alleged that the assets of the Insurance Company will be dissipated and lost and the security of the policy holders

the capital and assets of the Insurance Company. It was
alleged that there was payment of \$2,000 policy holders
in the Insurance Company, having insurance policies
\$7,000,000, and that for every year the Insurance Company
has been collecting premiums on approximately \$1,000,000
of this insurance and has refused to tender a statement
of their collection, and has failed to pay over to the
Insurance Company any part of the same as collected, and
it is impossible for the Insurance Company to know on what
what policies the premiums have been paid. It was alleged
that the Insurance Company is required by law to ensure
certain reserves to be invested at not less than 5% per
cent, as a protection to the policy holders; that these
reserves are created and maintained from premium payments
as they are made; that having no knowledge of the premiums
paid to the Agency Company, the Insurance Company was
unable to verify, or indeed, on its books a large amount
of insurance upon which it was known premiums had been paid
to the Agency Company; that failing to receive these premiums
from the Agency Company, the Insurance Company was not in a
position to create the reserves required by law for the pro-
tection of its policy holders, and it was alleged on inter-
view and belief, that the premiums so collected by the Agency
Company and not turned over to the Insurance Company, agree-
ment more than \$20,000, and by reason of this situation the
Insurance Company has not sufficient assets upon which to
realize \$20,000 or any substantial portion thereof, by
reason of the insolvency of the Agency Company and others.
It was alleged that the assets of the Insurance Company will
be dissipated and lost and the security of the policy holders

will be jeopardized and lost, unless a receiver is appointed to take possession of the Insurance Company's assets and property, and to manage and operate the same under the direction of the court and until the further order of the court.

It was further alleged that after Glover was removed as manager of the Insurance Company and the chairman of its board of directors, in August, 1923, he destroyed or caused to be destroyed, valuable records of the Insurance Company, including stockholders lists; policy holders lists; records of premium payments and other records which will cost a large amount of money to restore and some of which cannot be restored; and it was alleged on information and belief, that Glover will destroy or mutilate or cause to be destroyed or mutilated, other records and books of the Insurance Company, which are now in his control and which contain evidence of his waste, mismanagement and fraud, and that of the other defendants and Glover's criminality, conversion of property and civil liability; and that he will convert the securities and assets of the Company, if notice of the application for the appointment of a receiver is served upon him, or any of the defendants, wherefore, the complainants prayed that a receiver might be appointed without notice. As before stated, the bill prayed, not only for the appointment of a receiver and for an injunction, but that the purported election of October 17, 1924, be declared illegal and void.

The answer filed by the defendants denied practically all of the material allegations made by the complainants in their bill. The court appointed a receiver in accordance

with the prayer of the bill, and subsequently, upon application of the defendants for the discharge of the receiver, the court ordered that securities which were then in the hands of the receiver, of the value of \$58,600, be deposited in a bank which the court designated, to be held by the bank in escrow and withdrawn only upon the order of the court; and further, that the defendants file their bond in the sum of \$100,000, which was done, and upon the approval of the bond the receiver was discharged.

While the cause was thus pending, on January 19, 1925, certain of the complainants filed a petition setting up the filing of the original bill and the proceedings thereon, which had since been had. This petition referred to certain orders which had been entered requiring a deposit of certain records with the master, and the proceedings which were necessary to be had in order to accomplish compliance with those orders; that among the records so filed with the master was a petition of certain stockholders of the Insurance Company for the meeting of September 16, 1924, which was adjourned and later held on October 17, 1924; that many of the persons purporting to have signed the petition had not in fact signed it, such purported signatures being forgeries. It was further alleged in this petition filed on January 19, 1925, that among the records which had been deposited with the master were certain proxies which had been voted at the meeting of October 17, purporting to represent over 300,000 shares of the capital stock of the Insurance Company; that of these proxies those purporting to represent over 200,000 shares were without the revenue stamps required by law to

with the power of the bill, and consequently, the bill-
making of the commission for the discharge of the receiver,
the court ordered that the receiver should be appointed in the
name of the receiver, at the value of \$25,000, be deposited
in a bank which the court designated, to be held by the
bank in favor and to the order of the
court; and further, that the receiver should be appointed in
the name of \$25,000, which was done, and upon the approval
of the board the receiver was discharged.

While the case was thus pending, on January 19,

1902, certain of the complainants filed a petition setting
up the filing of the original bill and the proceedings thereon
which had since been had. This petition related to certain
orders which had been entered regarding a deposit of certain
records with the master, and the proceedings which were
necessary to be had in order to accomplish such a deposit.
These orders, that among the records be filed with the
master was a petition to certain witnesses of the receiver
for the receiver to be appointed in December 17, 1901, which was
affirmed and later still in October 17, 1902; that one of
the persons purporting to have signed the petition had not in
fact signed it, such purported signatures being forged.
It was further alleged in this petition filed on January 19,
1902, that among the records which had been deposited with
the master were certain papers which had been found at the
residence of October 17, purporting to represent over \$25,000
shares of the capital stock of the Insurance Company; that
of these papers those purporting to represent over \$25,000
shares were among the records which were filed in fact in

validate them; and there were also certain proxies representing over 100,000 shares of capital stock of the Insurance Company, which were dated subsequent to the date on which they were required under the by-laws of the Company to be filed with the secretary, and further, that among these proxies which had been filed by Clover and his associates were some representing over 24,000 shares of the capital stock of the Insurance Company, upon which the date of execution had been changed and which were therefore alleged to be invalid.

The petition of January 19, 1925, alleged further that on the day following the meeting held in October, those claiming to have been elected directors at that meeting, adopted certain new by-laws, which, among other things provided for the holding of the annual meeting of the stockholders of the Insurance Company on the first Monday in May in each year, and it was further alleged that Clover and his associates had sent out notices to the stockholders of the Insurance Company calling the regular annual meeting of said stockholders for February 3, 1925, at which meeting, it was alleged, Clover and his associates would attempt to re-elect themselves directors and thus continue their control of the Insurance Company. It was further alleged that since the filing of the original bill, Clover and his associates had caused the bill brought to foreclose the Baumruk mortgage to be dismissed and that they had taken no steps to bring the Zilligen case to trial nor to prosecute the bill for an accounting, pending against

...and there were also certain ...
...ing over 100,000 shares of capital stock of the ...
...company, which were listed ... to the date on which
...they were required under the ... of the company to be
...filled with the necessary, and together, that among those
...provisions which had been filed by Glover and his associates
...were some representing over 14,000 shares of the capital
...stock of the Insurance Company, upon which the same
...execution had been changed and which were therefore alleged
...to be invalid.

The petition of January 12, 1892, alleged
further that on the day following the meeting held in
October, there claiming to have been elected directors
of that meeting, ...
...which other things provided for the holding of the
annual meeting of the shareholders of the Insurance Company
on the first Monday in May in each year, and it was further
alleged that Glover and his associates had sent out notices
to the shareholders of the Insurance Company calling the
regular annual meeting at said stockholders for February
1, 1892, at which meeting, it was alleged, Glover and
his associates would attempt to re-elect themselves directors
and thus continue their control of the Insurance Company.
It was further alleged that since the filing of the original
bill, Glover and his associates had caused the bill brought
to foreclose the Insurance Company to be dismissed and that
they had taken no steps to bring the William case to trial
nor to prosecute the bill for an accounting, pending against

Glover and his associates, but on the contrary, had caused a resolution to be passed by those who were acting as directors of the Insurance Company, declaring the latter to be indebted to the Agency Company in a large amount, and directing the officers of the Insurance Company to issue a check for \$25,000, payable to the Agency Company.

It was further alleged that Glover dominated and controlled the management of the Insurance Company and those purporting to have been elected in October 1924; and that following that meeting, Glover had placed his confidential secretary in charge of all the books and records of the Insurance Company. It was alleged further that the certificates representing fraudulent issues of stock to Glover and the Agency Company did not bear the genuine signatures of the complainant Barovetz, who was president of the Insurance Company when these certificates purported to have been issued, but that the signatures purporting to be his, on said certificates, were forgeries.

The petitioners alleged further that Glover and his associates intended to vote all the proxies, therein alleged to have been illegal, at the meeting which had been called for February, 1925, and if they were allowed to conduct that meeting as they wished, they would deprive complainants and their associates of their right to vote the stock which was owned by them and the proxies which they held; but that if complainants were allowed to vote such stock and proxies they would elect a majority of the board of directors of the Insurance Company. It was further alleged that Glover and his associates would elect a majority of the

Glavin and his associates, but on the contrary, had caused a resolution to be passed by them who were acting as directors of the Insurance Company, declaring the intent to be returned to the company, which is a large amount, and directing the officers of the Insurance Company to issue a check for \$10,000, payable to the company's order.

It was further alleged that Glavin conspired and conspired the management of the Insurance Company and those purporting to have been elected as directors in 1934, and that following that meeting, Glavin had placed his confidential secretary in charge of all the books and records of the Insurance Company. It was alleged further that the confidential secretary had caused the issuance of a check to Glavin and the Insurance Company did not have the genuine signatures of the confidential secretary, who was president of the Insurance Company when these certificates purporting to have been issued, but that the signatures purporting to be his, are really confidential, and therefore,

The witnesses alleged further that Glavin and his associates intended to vote all the shares, which were alleged to have been illegal, at the meeting which had been called for February, 1935, and it was also alleged to come out that meeting as they wished, they could receive the dividends and their associates in their right to vote the shares which are owned by them and the shares which they held, but that it was intended to vote all the shares and question they would elect a majority of the board of directors of the Insurance Company. It was further alleged that Glavin and his associates would elect a majority of the

directors and officers of the Insurance Company by fraud, unless such election was held under the supervision of the court, and that in this manner they would appropriate to themselves the funds and assets of the company, to the loss and detriment of the complainants and the other stockholders; and it was alleged that the business and property of the Insurance Company could only be protected and conserved by the court taking charge of and conducting the election, and thereby insuring that the election be honestly and fairly conducted. The petitioners further set forth the provisions of the by-laws requiring all proxies to be filed with the secretary of the company, 10 days before the meeting at which they were to be used; and it was alleged that the interests of complainants and their associates would be seriously jeopardized if they were required to leave their proxies with the one who was then acting as the secretary of the company or with the proxy committee dominated by Glover; and the complainants therefore prayed that all proxies to be voted at the approaching meeting should be filed with the secretary, but that he should receive them at the office of the master, and immediately turn them over to said master, to be held by him for proper inspection by any of the parties interested.

Pursuant to the foregoing petition, filed on January 19, 1925, the court entered an order on February 2, 1925, "on agreement of the parties" appointing a special master to attend the meeting of the stockholders of the Insurance Company, to be held on the following day, and

directors and officers of the Insurance Company by law,
unless such election was held under the supervision of the
court, and that in this manner they could appropriate the
assets of the funds and assets of the company, to the loss
and detriment of the stockholders and the other stockholders;
and it was alleged that the business and property of the
Insurance Company could only be protected and conserved
by the court taking charge of and conducting the election,
and thereby insuring that the election be honestly and fairly
conducted. The petitioners further set forth the provisions
of the by-laws regarding all matters to be filed with the
secretary of the company, 10 days before the meeting at which
they were to be used; and it was alleged that the interests
of stockholders and their associations would be seriously
jeopardized if they were required to leave their papers
with the one who was then acting as the secretary of the
company or with the proxy committee dominated by them;
and the petitioners therefore prayed that all matters to be
voted at the upcoming meeting should be filed with the
secretary, and that he should receive them at the office of
the company, and immediately file them with the secretary
to be held by him for proper inspection by any of the parties
interested.

Reference to the foregoing petition, filed on
January 18, 1932, the court entered an order on February
2, 1932, "on application of the petitioners appointing a special
master to attend the meeting of the stockholders of the
Insurance Company, to be held on the following day, and

all adjournments of that meeting. By the terms of this order the court directed that said master act as chairman of the meeting and preserve order and report the proceedings of the meeting to the court, and what directors, if any, were there elected; that the master employ a shorthand reporter to report the proceedings of the meeting. It was further provided that any directors that might be elected were not to take office until the court had passed upon the election. The meeting in question and the adjournments thereof were duly held, with the master in charge. The master originally appointed asked to be relieved and another was appointed in his place. The latter submitted his report on April 10, 1925, to the effect that the election had resulted in the choice of eight directors allied with the complainants and seven allied with the defendants. The defendants filed objections to this report which were duly argued and overruled. These were later made exceptions before the chancellor and there argued at length, and at the conclusion of this argument, the report referred to was re-referred to the master, "no party objecting thereto, for the purpose of hearing testimony, examining books, documents and papers and determining the facts and truth in relation and pertaining to the said election of directors by the stockholders of the said Public Life Insurance Company at its annual meeting, convened February 3rd, 1925, and adjournment thereof, and all acts, doings and proceedings, taken in connection therewith." This order of re-reference was entered May 14, 1925. Extensive hearings were had, and on September 29, 1925, the master submitted his report,

[illegible]

and the issues involved were again argued before the court on exceptions to the report of the master. Many exceptions submitted by the complainants were sustained. A few were overruled as were also certain exceptions interposed by the defendants. The court then entered a decree on October 28, 1925, in which the court found that a large number of the proxies which had been voted for the Clover candidates were forgeries, and that as a result votes based upon 3221.75 shares should be deducted from the vote received by those candidates. The court decreed that certain named persons, eight of whom were affiliated with the complainants and four with the defendants "were and are hereby declared elected directors of the defendant Public Life Insurance Company at the election beginning February 3, 1925, of the said company, for the ensuing year and until the next annual election of the said PublicLife Insurance Company, and are entitled to immediately take, and enter into the position of directors of said company and to continue to act as such directors until their successors are elected and qualified." In this decree the court further ordered that the defendants allow those who had been thus declared elected, "to immediately take, and enter into their positions as directors of said company, and continue to act and serve as such directors until their successors are elected and qualified." It was further ordered that the defendants "pay the costs and charges herein" in the sum of \$4,453.85. One of the defendants prayed an appeal from this decree, which was later dismissed in this court.

It appears from the record that after the court

and the issues involved were again argued before the court
on exceptions to the report of the master. Many exceptions
submitted by the complainants were sustained. A few were
overruled as were also certain exceptions interposed by the
defendants. The court then entered a decree on October 22,
1911, in which the court found that a large number of the
provisions which had been voted for the Oliver & Whittier
company, and that as a result votes passed upon 1911-12
votes should be declared from the votes received by these
companies. The court decreed that certain bonds, notes,
and other securities of the complainants and the
defendants were and are hereby declared forfeited
to the Oliver & Whittier company, its successors and assigns
of the election beginning February 2, 1912, at the said
company, for the amount of the said bonds, notes and
other securities of the said Oliver & Whittier company, and are
declared to immediately take, and enter into the position
of directors of said company and to continue to act as such
directors until their successors are elected and qualified. In
this decree the court further ordered that the defendants
allow those who had been then declared elected, "to
immediately take, and enter into their positions as directors
of said company, and continue to act and serve as such
directors until their successors are elected and qualified."
It was further ordered that the defendants "pay the costs
and charges herein in the sum of \$4,432.00. One of the
defendants payed on appeal from this decree, which was
later dismissed in this court.

It appears from the record that when the court

had entered the order of October 28, 1935, the individuals who were therein declared to be duly elected directors of the Insurance Company, met and elected officers, Karowetz being elected chairman of the board, Burke president, and general manager, and Welsh secretary and treasurer. On October 30, 1935, these duly elected officers of the Insurance Company filed a petition setting up their election at the meeting of the directors held after the entering of the order of October 28, and alleging that after their election as officers of the company they had made a demand on the defendant Glover for the keys to the Insurance Company's building, but that Glover said he did not have them and did not know where they were; that they had demanded that Glover turn over possession of the building to Burke, as president of the company, and also all of the company's property, and that Glover had refused to recognize the demand; also that Welsh had sought to make a demand on one Kuhn who was affiliated with the Glover faction, and had been acting as secretary and treasurer, demanding that he turn over all papers, books, documents and moneys of the company, in his hands, but that although Kuhn had been present at the meeting of directors, at which petitioners had been elected as officers of the company, he had disappeared a few minutes prior to the adjournment of the meeting and could not be found, either at the office of the company or his place of business or his home, and that he was evading petitioners, so as to avoid a demand being made upon him. It was further alleged that the petitioners had sought to place a watchman in the building belonging to the Insurance Company, but

has entered the name of October 12, 1902, and has been
the name therein changed to be fully stated in the
of the Insurance Company, and has stated otherwise,
However being stated otherwise at the same time,
financial, and financial company, and which is
and financial, of October 12, 1902, there being stated
officers of the Insurance Company filed a petition setting
up their election at the meeting of the Insurance held
after the meeting of the order of October 12, and
alleging that their election as officers of the
company they had made a demand on the Insurance Company
for the keys to the Insurance Company's building, and
that they would not give them and did not want
them any more; that they had demanded that they
take over possession of the building to house, as provided
of the company, and also all of the company's property,
and that they had refused to recognize the demand and
that they had sought to make a demand on one who was
not entitled to the same, and that they had been
refused a meeting and financial, and that they had
over all papers, books, documents and copies of the company,
in his hands, and that although they had been present at the
meeting of the Insurance, at which petitioners had been elected
as officers of the company, he had disappeared a few minutes
prior to the adjournment of the meeting and could not be
found, either at the office of the company or his place
of business or his home, and that he was evading petitioners,
so as to avoid a demand being made upon him. It was further
alleged that the petitioners had sought to place a witness
in the building belonging to the Insurance Company, but

that the defendant Ralph Wylie refused to permit a watchman to enter the building. The petitioners represented that without the assistance of the court they would be unable to get possession of the company and its property, and they prayed that an order be entered directing that the sheriff assist them in getting possession of the building, and that a rule be entered on Clover, Kuhn, and Wylie, to show cause why they should not be attached for contempt of court for violating the court's order.

On November 10, 1925, the court entered an order finding that the petitioners who had filed the petition of October 30, had been duly elected as the officers of the Insurance Company, as stated in said petition, and it was ordered that Clover turn over to them all the assets of the company in his possession, custody or control, and that Kuhn turn over to Welsh all the books, records, assets and property of the company in his possession, custody or control, except such securities of the company as had been deposited in the Reliance State Bank.

On November 13, 1925, the court entered another order finding that Clover had not turned over the property and assets of the company which were under his control, and that Kuhn had likewise failed to comply with the provisions of the previous orders of the court; and it was ordered that Harowetz, Burke and Welsh "take possession and control of the property and assets of said Insurance Company and retain and keep the same until their respective successors are elected according to law."

that the defendant Ralph Wilson be named a defendant
in order to bring the suit on. The petition was
without the signature of the party who would be named
in the execution of the company and its property, and
they prayed that an order be entered directing that the
shareholders be in getting possession of the property
and that a title be entered on Oliver, Kuhn, and Wilson, to show
cause why they should not be awarded for recovery of same.
The petition was granted.

On November 15, 1938, the court entered an order
directing that the petitioners who had filed the petition of
October 20, had been duly elected as the officers of the
Innocent Company, and stated in said petition, and it was
ordered that Oliver turn over to them all the assets of the
company in his possession, control or custody, and that
Kuhn turn over to them all the assets, control, custody and
property of the company in his possession, control or cus-
tody, except such securities of the company as had been de-
posited in the Delaware State Bank.

On November 15, 1938, the court entered another
order directing that Oliver had not turned over the property
and assets of the company which were under his control,
and that Kuhn had likewise failed to comply with the pro-
visions of the previous orders of the court, and it was
ordered that Kuhn, Oliver, and Wilson "take possession
and control of the property and assets of said Innocent
Company and retain and keep the same until their respective
successors are elected according to law."

Successors are elected according to law.

Subsequently, the defendants sued a writ of error out of this court seeking to reverse the decree of October 28, and the orders of November 10 and 13. This writ of error was dismissed in this court on June 4, 1926.

On November 19, 1925, Harowitz, Burke and Welsch, filed another petition setting up the provisions of the decree of October 28, and also the orders which the court had subsequently entered. In this petition it was alleged that on November 11, 1925, the defendants Baumruk, Garland, Roy, Kunselman, McDonnell, White, Harbeck and Williams, had held what purported to be a meeting of the board of directors of the Insurance Company, where they adopted a resolution declaring that the decree which the court had entered on October 28, did not carry out the will of the stockholders; and in this resolution Baumruk was directed to notify all the banks holding securities of the Insurance Company not to turn over any such securities to the newly elected directors; and that Baumruk thereafter took the action he was directed to take in that resolution, all of which was in violation of and in defiance of the decree entered October 28, and the order entered on November 10. The petition then recited that following the order of November 13, they attempted, with the aid of the sheriff, to take possession of the building and general offices of the Insurance Company in Chicago, but were denied such possession by Baumruk, and restrained in their efforts to accomplish possession, by defendants Harbeck, Wylie, Daniels, Ginsberg, Butler, and Uttech, who threatened the petitioners and the deputies who were guarding them, as specifically set out in the petition. The petition further set out a notice or letter

Consequently, the defendant was a writ of
error out of this court seeking to reverse the decree of
October 22, and the orders of November 10 and 12. This
bill of error was dismissed as this court on June 4, 1906.

On November 12, 1905, defendant, Burns and others,
filed another petition setting up the provisions of the
charter of October 22, and also the writs of the court
subsequently entered. In this petition it was alleged
that on November 11, 1905, the defendants Burnham, Collins,
Ray, Kennel, and others, who were then and still are,

had held what purported to be a meeting of the board of
directors of the Insurance Company, after they elected a
temporary committee consisting of three persons, one of whom had
entered on October 22, and that every one who did so was
excluded; and in this resolution Burnham was directed
to notify all the stock holding members of the Insurance

Company not to turn over any cash securities to the newly
elected directors; and that Burnham thereafter took the action
he was directed to take in that resolution, all of which was

in violation of and in defiance of the charter entered
October 22, and the order entered on November 10. The
petition then recited that following the order of November
12, they attempted, with the aid of the sheriff, to take

possession of the building and general affairs of the Insurance
Company in Chicago, but were denied such possession by
Burnham, and restricted in their efforts by accordingly
possession, by defendant Kennel, Ellis, and others.
Ellis, and others, who threatened the petitioners and the
petitioners who were granting them, as specifically set out in
the petition. The petition further set out a notice as before

which the defendants had caused to be sent to the stockholders of the company on November 16, which was alleged to be in violation of the orders which the court had entered. Upon the filing of this petition a rule was entered directing all the respondents to show cause why they should not be punished for contempt of court. The respondents, Wylie, Daniels, Ginsberg, Butler, and Uttech, filed an answer to the petition denying the allegations which had been made therein, charging that they had interfered with the efforts of the petitioners to gain possession of the Insurance Company's building and other property. The other respondents filed an answer denying that a meeting of directors had been convened, pursuant to the by-laws of the company on October 28, and that the petitioners had been properly elected officers of the company at that meeting, as alleged by them in their petition. They further alleged that the court was without jurisdiction to enter the decree of October 28, and the subsequent orders. They admitted that on November 11, 1925, they had held a meeting, as alleged in the petition, and had passed a resolution that the decree of October 28, did not carry out the will of the stockholders of the company and directing Baumruk to notify all banks holding securities of the company, not to turn over any such securities to the directors who had been declared elected, in the decree entered on October 28; and they admitted that Baumruk thereafter did so notify the Reliance State Bank not to turn over the securities in their possession to those directors. These respondents likewise denied all allegations in the petition to the effect that petitioners had been denied access to the company's offices and property, or

which the statements but seemed to be sent to the effect-
holders of the company on November 10, which was alleged
to be in violation of the statute which the court has
enacted. Upon the filing of this petition a writ was
entertained directing all the respondents to show cause why
they should not be enjoined from continuing to carry on the
business, and to show cause why they should not be
enjoined from continuing to carry on the business.
The respondents filed an answer denying that a meeting
of directors had been convened, pursuant to the by-laws of
the company on October 20, and that the petitioners had been
properly elected officers of the company at that meeting, as
alleged by the petitioners. They further alleged that
the same was a mere sham and that the petitioners were
not entitled to the relief sought. They alleged that
on November 11, 1928, they had held a meeting, as alleged
in the petition, and had passed a resolution that the votes
of October 20, did not carry out the will of the stockholders
of the company and directing them to call all hands
meeting of the company, and to take over any such
business as the directors had been authorized to do,
in the absence of the directors on October 20; and they alleged that
thereafter they had no right to the business of the
company and that the petitioners in their possession to those
directors. These respondents likewise denied all allega-
tions in the petition as to the effect of the petitioners had
been called upon to the company's officers and property, or

that their efforts to secure possession of the same had been frustrated and interfered with.

A hearing having been held on the foregoing petitions and answers thereto, the court entered an order on March 12, 1936, finding certain respondents not guilty and others guilty, and ordering the latter to pay fines varying in amounts from \$100 to \$300. The respondents Butler, Garland, Roy, Konzelman, McDonnell, White, Harbeck, Ginsberg and Uttsch, were each ordered to pay a fine of \$100. The respondents Glover and Wylie were each ordered to pay a fine of \$200. Respondent Williams was ordered to pay a fine of \$250, and respondent Baumruk a fine of \$300. The rule was discharged as to the others. Those who were found guilty and ordered to pay fines, have perfected their appeal from that order, which is case No. 31306.

Thereafter, the cause came on to be heard on a motion of complainants to fix the costs, and on June 29, 1936, the court entered an order that the defendants therein named pay the costs and charges taxed therein; to the master the sum of \$3188.05 and to the complainants, \$4454.85. From that order all but five of the defendants perfected their appeal, which is case No. 31307 in this court. The five defendants who failed to perfect their appeal from the order taxing the costs later sued a writ of error out of this court, for the purpose of securing a reversal of that order, and this latter case is No. 31622 in this court. As before stated, these two appeals and the writ of error have been consolidated for

that their efforts to secure possession of the same had been frustrated and interrupted when.

A hearing having been held on the foregoing petition and answers thereto, the court entered an order on March 11, 1906, finding certain respondents not guilty and ordering the latter to pay fines and costs jointly, and ordering the latter to pay fines and costs jointly from \$100 to \$500. The respondents, Miller, Wilson, Ray, Kinsman, Johnson, White, Hubert, Lindeberg and others, were each ordered to pay a fine of \$100. The respondents Brown and Ellis were each ordered to pay a fine of \$500. Respondent Williams was ordered to pay a fine of \$250, and respondent Houtman a fine of \$500. The rule was discharged as to the others. Those who were found guilty and ordered to pay fines, have paid their fines and costs, which is now in full.

Thereafter, the same case as so heard on a motion of respondents to fix the costs, was on June 29, 1906, the court entered an order that the defendants should stand by the costs and charges found payable by the court, the sum of \$118.75 and to the complainant, \$44.00. This order was set aside by the court on the defendants' appeal, which is now on file in this court. The five defendants who failed to pay the costs and charges from the order having the costs later paid a writ of error out of this court, for the purpose of securing a reversal of that order, and this latter case is now on file in this court. It being stated, these two appeals and the writ of error have been consolidated for

hearing.

The defendants having sued out a writ of error seeking to reverse the decrees of October 28, and the orders of November 10 and 13, and that writ of error having been dismissed in this court, they are now precluded from urging that the court erred in entering them. However, if the decrees and orders referred to were void for want of jurisdiction in the court who entered them, although that fact may not justify the defendants in refusing to comply with them, the court would be without power to punish such action on the part of the defendants, as the court cannot punish, as for a contempt, disobedience of an order made without jurisdiction. People v. Weigley, 155 Ill. 491; People v. Kowalski, 307 Ill. 378. But we are clearly of the opinion that in the case at bar the court had jurisdiction to enter the orders referred to. The allegations of the bill of complaint show that the stockholders of the Insurance Company were divided into two factions and that a bitter dispute was in progress, to gain and retain control of the Company's affairs, which had reached a point where it not only endangered the existence of the company and jeopardized the holdings of the stockholders, but also seriously endangered the interests of the policy holders. The bill was primarily one for the appointment of a receiver to take possession of the company and its assets, and conserve them for all the interests involved, and also for an injunction. In our opinion, the allegations made, clearly brought the cause within the jurisdiction of a court of equity for

being.

The defendant having used such a visit of course
leading to receive the shares of October 26, and the shares
of November 12 and 13, and that visit of either having been
effected in this court, they are now presented to the court
that the court should be satisfied that, however, it is
shown that the shares referred to were sold for cash at public
auction in the court who entered them, although that fact
may not justify the statement in relation to simply with
them, the court should be without power to grant such

action on the part of the defendant, as the court cannot
grant, as for a writ, the defendant of an order made
without jurisdiction. People v. Linsley, 120 N.Y. 401;
People v. Linsley, 120 N.Y. 402. But we are clearly

of the opinion that in the case at bar the court had jurisdiction to enter the order referred to. The allegations
of the bill of complaint show that the stockholders of the
Insurance Company were divided into two factions and that
a bitter dispute was in progress, to gain and retain control
of the Company's assets, which had reached a point where it
not only endangered the existence of the company and jeopardized
the interests of the stockholders, but also seriously endangered
the interests of the policy holders. The bill was presented
and the appointment of a receiver to take possession
of the company and its assets, and conserve them for all
the interests involved, and also for an injunction. In
our opinion, the allegations are clearly sufficient to
warrant within the jurisdiction of a court of equity for

that purpose. High on Receivers, sec. 304, 692. As was said by this court in Warrifield v. Burrows, 153 Ill. App. 523, if a court of equity is powerless to grant such relief, under circumstances such as were alleged in this bill, then those who may be the owners of a majority interest in a corporation, finding themselves in such a situation as is disclosed here, would be without any adequate remedy, and ~~XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX~~ might be obliged to submit to whatever terms might be imposed by a group making up a minority.

The situation disclosed by the allegations in the bill of complaint, being such as to give the court jurisdiction, for the reasons above referred to; and it being further alleged that the defendants had accomplished the election of certain individuals as directors, by means of forged proxies, and others which had been signed without warrant or authority, and others which had not been filed with the secretary in the manner prescribed by the by-laws of the company; and that they had succeeded in preventing the complainants from voting proxies which they had procured, and which were alleged to be valid, and to have been filed in the manner prescribed by the by-laws, and that these, together with the votes of the complainants, to which they were entitled personally, constituted a majority interest, it was proper in our opinion for the court to entertain that feature of the controversy also. Citation of authority is not necessary, to the effect that a court of equity will retain jurisdiction for the purpose of administering complete relief, where it has acquired jurisdiction of the subject-

The attention directed by the allegations in the bill of complaint, being such as to give the court jurisdiction, for the reasons above referred to, and it being further alleged that the defendants had accomplished the election of certain individuals as directors, by means of forged proxies, and others which had been signed without trust or authority, and others which had not been filed with the secretary in the manner prescribed by the by-laws of the company; and that they had succeeded in preventing the shareholders from voting proxies which they had procured, and which were alleged to be valid, and to have been filed in the manner prescribed by the by-laws, and that those together with the votes of the complainants, so which they were entitled personally, constituted a majority interest, it was proper in our opinion for the court to interfere in the election of the directors also. Election of authority is not necessary, so the effect that a court of equity will not interfere for the purpose of administering complete relief, where it has acquired jurisdiction of the subject-

matter on some ground which properly comes within its power. We are not now concerned with the merits of the decree of October 28, or the orders of November 10 and 13, except to the extent of holding that the court had jurisdiction to enter them.

It is contended in case No. 31206 that the trial court erred in finding certain respondents guilty of contempt of court and punishing them therefor, by ordering them to pay certain fines. As to the respondents Baumruk, Garland, Roy, Konzelman, McDonnell, White, Harbeck, and Williams, we have referred to the answer which they filed to the petition of November 19, 1925, in which they admitted that, following the entering of the decree of October 28, and the order of November 10, they had on November 11, held a meeting purporting to be a meeting of the board of directors of the Insurance Company, consisting of individuals other than those who had been declared elected as such directors by the terms of the decree of October 28, and that they had there passed a resolution declaring that the decree which the court had entered did not carry out the will of the stockholders of the company, and directing one of their number to notify the banks holding securities of the company not to turn them over to those who had been declared elected as directors of the company by the terms of the decree of October 28; and in which they further admitted that ^{the} one who had been so directed, had acted pursuant to such directions. It clearly appears from the record that these respondents were most of them present in court when the decree and the order referred to were entered, and that they were all entirely familiar with the

order in some cases which properly comes within the
power, in the case now concerned, of the order of
the court in October 18, in the order of November 10
and 11, and to the extent of holding that the court
has jurisdiction to enter same.

It is contended in case no. 11008 that the trial

court erred in finding certain respondents guilty of
violation of court and maintaining their property by order
and to say certain things. As to the respondents
Gordon, Gilling, Roy, Wesselman, Kellum, White, Kellum,
and Williams, we have referred to the money which they
owed to the position of November 18, 1928, in which
they admitted that, following the entering of the decree
of October 28, and the order of November 10, they had on
November 11, held a meeting purporting to be a meeting of
the board of directors of the Insurance Company, consisting
of individuals other than those who had been elected
elected as such directors by the terms of the decree of
October 28, and that they had there passed a resolution
declaring that the decree which the court had entered did
not carry out the will of the shareholders of the company,
and directing one of their number to notify the banks
holding deposits of the company not to turn them over to
those who had been declared elected as directors of the
company by the terms of the decree of October 28; and in
which they further admitted that one who had been so directed,
had acted pursuant to such direction. It clearly appears
from the facts that these respondents were more or less
sent in court when the decree and the order referred to were
entered, and that they were all entirely familiar with the

terms of the decree and of the order. Such admissions by these respondents were entirely sufficient to justify the court in finding them guilty of a contempt of court and assessing the fines against them of which they now complain. Such action upon their part was clearly a contempt of court and merited punishment as such.

As to the respondents Wylie, Butler, Baumruk, Ginsberg, and Uttech, the record shows that they were all present at the Insurance Company's building on the afternoon of November 13, 1935, when the petitioners and complainants who were the duly elected officers of the Insurance Company, went there pursuant to the orders of the court, and with the assistance of certain deputy sheriffs, attempted to get possession of the building and the offices of the Company, together with its personal property, and it is clearly shown that some of them actively interfered with all these petitioners attempted to do, in the way of gaining possession, and when they failed to prevent the petitioners from getting into the premises, they did what they could to prevent the accomplishment of petitioners' further efforts to take full possession. This is especially true of Baumruk and of Wylie, who were fined \$300 and \$300 respectively, but less so of Butler, Ginsberg and Uttech who were each fined \$100. These three last referred to, contend that they had nothing to do with the proceedings but merely happened to be present. The evidence on this point is in conflict, but without reviewing it at length in this opinion, we will say that we have examined it all, and that in our opinion it is not such as we believe would justify us in holding that

terms of the order and of the order. Such admissions by these respondents were entirely sufficient to justify the court in finding them guilty of a contempt of court and assessing the fines against them at which they now stand. Such action upon their part was clearly a contempt of court and merited punishment as such.

As to the respondents Wylie, Butler, Glueberg, Glueberg and Utzsch, the record shows that they were all present at the hearing on January 12, 1908, when the petitioners and complainants who were the duly elected officers of the Insurance Company, went before the court in the exercise of the court, and with the assistance of certain deputy sheriffs, attempted to get possession of the building and the office of the Company, together with its personal property, and it is clearly shown that some of them actively interfered with all these petitioners attempted to do, in the way of gaining possession, and when they failed to prevent the petitioners from getting into the premises, they did what they could to prevent the accomplishment of petitioners' further efforts to take full possession. This is especially true of Glueberg and of Wylie, who were fined \$500 and \$200 respectively, but also of Butler, Glueberg and Utzsch who were each fined \$100. These three last referred to, contend that they had nothing to do with the proceedings but merely happened to be present. The evidence on this point is in conflict, but without reviewing it at length in this opinion, we will say that we have examined all this, and that in our opinion it is not such as we believe would justify us in holding that

it was insufficient to warrant the action of the court as to these three respondents. As to the respondent Glover it appears from the record that his offense consisted not only in what he did but also in what he failed to do, in compliance with the court's orders. It clearly appears that he was the head and front of the group in which the defendants associated themselves. All through this controversy, it has been called the "Glover faction." It is the contention that when the court entered the orders to which reference has been made, directing him and his associates to turn over to those who had been declared elected as directors, and those who, by such directors, had been elected officers of the company, the company's assets and property, he did not have any such in his possession to turn over; and he further contends that he offered to cooperate in every way with the newly elected directors and officers in their efforts to take possession, as the court ordered, and administer the affairs of the company. This was denied by the complainants and petitioners and is the subject of testimony which is in sharp conflict. Glover was one of those who joined in sending a notice to all stockholders under date of November 16, 1925, after the court had entered the decree of October 28, and the orders of November 10 and 13. While that notice may not be said to run counter to the letter of the provisions to be found in that decree, and in those orders, it clearly carried some inferences which were quite contrary to their spirit. We believe the record, is such as to support the action of the court as to the respondent Glover as well as to the others.

it was incumbent to submit the matter to the court as
to these three respondents, as to the respondent Glover
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in what he did but also in what he failed to do, in comply-
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and the order of November 10 and 12. While that motion
may not be said to be counter to the order but the two
visions is set forth in that decree, and in those orders, it
clearly required some action which was quite contrary
to their rights. We believe the record, as well as we suppose
the action of the court as to the respondent Glover as well as
the others.

Turning now to the appeal and writ of error having to do with the order taxing costs, being case No. 31307, and case No. 31622. In our opinion, in view of all that had occurred up to January, 1926, the allegations to be found in the petition filed on January 19, 1926, were such as to justify the court in appointing a master to take charge of the meeting of the stockholders of the Insurance Company, then shortly to be held for the purpose of electing new directors. We are likewise of the opinion that the court had jurisdiction to entertain such a petition at that stage of the proceedings and to take the action which followed. 3 Cook on Corporations, (8th Ed.) sec. 618. It may not be said that the petitioners had an adequate remedy at law by quo warranto if they felt such action warranted, after the election had taken place. They were entitled to have a meeting of the stockholders, called and held under such supervision as would give everybody a reasonable opportunity to exercise their rights as stockholders. West Side Hospital v. Steels, 124 Ill. App. 534. Bartlett v. Bates, 118 Fed. 66.

The order which was entered by the court appointing the master to take charge of the election to be held in February, 1926, was entered "on agreement of parties", as the order itself recites. The record shows that some time prior to this, the defendants themselves had invoked the aid of a court of equity, attacking an election of directors which had been held prior thereto, and in connection with this petition in the case at bar, we find them expressly agreeing to and concurring in the action of the court in appointing a master to attend a

meeting of the stockholders to be held for the same purpose. In our opinion, they are estopped now from questioning the jurisdiction of the court in that regard. Darst v. Kirk, 230 Ill. 521. Horn v. J. O. Neegen Lumber Company, 236 Ill. 187, 208. When the report of the master was subsequently submitted covering the results of this election, objections were interposed which resulted in a long conflict. The defendants succeeded in having the report referred back to the master for the purpose of taking testimony. Extensive hearings were had by the master on this re-reference, the testimony, making up four volumes of the record filed in this court; over 300 witnesses were called. The complainants established the fact that of the proxies voted by the defendants at the election in question, nearly 150 had in fact not been signed by the stockholders whose signatures they purported to carry. The original report which had been submitted was to the effect that 8 directors affiliated with the complainants and 7 affiliated with the defendants had been elected. After the lengthy hearing before the master on the re-reference, the master reported that the 8 directors affiliated with the complainants had been elected but that only 4 of those affiliated with the defendants had been elected.

In view of all the facts referred to, it would seem to be entirely clear that the trial court could not reasonably be said to have in any manner abused his discretion in taxing the costs, as provided in the order to which the defendants now take exception, some by way of appeal and some by writ of error.

For the reasons we have given, the decree finding certain defendants to be in contempt of court, and assessing fines against them as a punishment therefor, is affirmed; and the subsequent decree taxing costs, is likewise affirmed.

DECREE AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

178 - 31310

ALVIN E. NELSON AND EARLE S.
NELSON, Co-partners doing business
as NELSON BROTHERS,

Appellants,

v.

E. E. SHIERK,

Appellee.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

Opinion filed Monday, June 13, 1927.

MR. JUSTICE THOMSON delivered the opinion of
the court.

By this appeal the plaintiffs, Nelson Brothers,
seek to reverse a judgment for \$537.95, recovered against
them in the Municipal Court of Chicago by the defendant,
on the latter's claim for set-off.

The record shows that the defendant, Shierk,
applied to Nelson Brothers, who were in the business of
loaning money, for a loan of \$1,000, to be secured by
his automobile. The plaintiffs declined to make the loan,
on the ground that they did not consider the automobile
of sufficient value to warrant it, but stated the loan
could be arranged if further collateral was forthcoming.
The defendant had previously borrowed some money from a
Mrs. Mack, to enable him to go into business, and it appears
that when it developed that he needed some additional money,
and was unable to arrange a further loan on the security he had,
Mrs. Mack offered to put up some jewelry she owned, as addi-
tional collateral. This was acceptable to the plaintiffs

2451A. 620

115 - 1110

JAMES E. SMITH AND EMILIE E.
SMITH, CO-DEFENDANTS
vs
JAMES E. SMITH AND EMILIE E.
SMITH, CO-DEFENDANTS

James E. Smith
Emilie E. Smith
Defendants

James E. Smith and Emilie E. Smith
Defendants

J. E. SMITH

Defendant

Opinion filed Monday, June 18, 1937.

Mr. JUSTICE THOMAS delivered the opinion of

the court.

By this appeal the plaintiffs, Nelson Brothers, seek to reverse a judgment for \$257.50, recovered against them in the Municipal Court of Chicago by the defendant, on the latter's claim for car-tax.

The record shows that the defendant, EMILIE, applied to Nelson Brothers, who were in the business of loaning money, for a loan of \$1,000, to be secured by his automobile. The plaintiffs declined to make the loan on the ground that they did not consider the automobile of sufficient value to warrant it, and stated the loan could be arranged if further collateral was forthcoming. The defendant had previously borrowed some money from Mrs. Mark, to enable him to go into business, and it appears that when it developed that he needed some additional money and was unable to arrange a further loan on the security he had Mrs. Mark offered to put up some jewelry she owned, as additional collateral. This was acceptable to the plaintiffs.

and the loan was made. The plaintiffs insisted that Mrs. Mack as well as the defendant execute the note, which she did. It is the contention of the plaintiffs that some additional charges were involved in the making of the loan, and the note which the defendant and Mrs. Mack signed was for \$1167, for which the defendant received \$1,000. To secure that note, the defendant executed a chattel mortgage covering his automobile valued at \$700. This was duly delivered to the plaintiffs and recorded by them. As further security for the payment of their note, a diamond ring owned by the defendant, and the jewelry above mentioned, owned by Mrs. Mack, was deposited with the plaintiffs. The latter put this jewelry, consisting entirely of rings, in an envelope marked with defendant's name, and placed it in a steel safe located in their office. Some time after that the plaintiffs' office was burglarized; the combination lock on the safe was broken off by means of a sledge hammer or mallet, and valuables were stolen, including the rings which had been deposited with the plaintiffs as security for the payment of this loan. When the defendant and Mrs. Mack were advised of the burglary, they asked the plaintiffs what they proposed doing, and they took the position that they were not under any obligation to do anything, inasmuch as their duty as pledgees of this personal property was fulfilled when they exercised ordinary and reasonable care in the matter of its safe-keeping, and that inasmuch as they had used such care, they were not responsible for the loss of the rings.

The defendant, claiming that the plaintiffs were responsible for the loss of the collateral deposited with

and the loan was made. The plaintiff's interest was
that, as well as the statement executed by the wife, which
she did. It is the contention of the plaintiff that some
additional charges were involved in the making of the loan,
and the note which the defendant and Mrs. Reed signed was for
\$115, for which the defendant received \$1,000. It seems
that note, the defendant executed a postal note payable
for the automobile valued at \$750. This was duly delivered
to the plaintiff and recorded by them. As further security
for the payment of their note, a diamond ring owned by the
defendant, and the jewelry above mentioned, owned by Mrs.
Reed, was deposited with the plaintiff. The latter put this
jewelry, consisting entirely of rings, in an envelope marked
with defendant's name, and placed it in a steel safe located
in their office. Some time after that the plaintiff's office
was burglarized. The combination lock on the safe was broken
off by means of a sledge hammer or mallet, and valuables
were stolen, including the rings which had been deposited
with the plaintiff as security for the payment of this
loan. When the defendant and Mrs. Reed were advised of
the burglary, they asked the plaintiff what they proposed
doing, and they took the position that they were not under
any obligation to do anything, inasmuch as their duty as
pledgees of this personal property was fulfilled when they
received ordinary and reasonable care in the making of the
safe-deposit, and that inasmuch as they had used such care,
they were not responsible for the loss of the rings.

The defendant, claiming that the plaintiff were
responsible for the loss of the collateral deposited with

them, and that, therefore, they were not only not entitled to any payments, except such as had already been made on the note, but should pay for the value of the rings, in excess of the balance which was due on the note at the time the burglary took place, refused to meet further payments as they fell due. As soon as the defendant was in default, the plaintiffs instituted a replevin suit, but did not succeed in getting possession of the automobile covered by the chattel mortgage. They, therefore, changed the form of their action to trover, claiming a conversion of the automobile by the defendant. The defendant filed an affidavit of merits to the plaintiffs' statement of claim in conversion and he also filed an affidavit of claim for set-off for the value of the rings, both his own and those which Mrs. Mack had deposited as additional collateral, to enable him to negotiate the loan he desired. This statement of claim for set-off, as originally filed, apparently inadvertently, failed to include one of Mrs. Mack's rings. When this was discovered in the course of the trial, leave was granted the defendant to amend so as to include the ring which had been omitted. The plaintiffs filed an affidavit of merits in reply to the defendant's claim for set-off, and the case went to trial before the court without a jury. At the conclusion of the hearing the trial court found the issues against the plaintiff and in favor of the defendant, on his claim for set-off, and assessed his damages at the sum of \$537.95; following which the judgment appealed from was entered.

In holding that the plaintiffs were liable for the value of the jewelry deposited with them to secure

[illegible]

the payment of the note given them when they loaned the defendant \$1,000, the trial court presumably found, from the evidence, that in providing for the safe-keeping of it, the plaintiffs had not exercised ordinary and reasonable care. The plaintiffs contend that they did exercise such care. In our opinion the evidence in the record is not such as to warrant this court in holding that the finding of the trial court on this issue was against the manifest weight of the evidence. The office of the plaintiffs was located at 6310 Broadway in the City of Chicago on the ground floor of a fire-proof building. The steel safe in which the rings were kept was located in the Cashier's office, a short distance back from a window facing on the street. The burglary took place about the middle of June, between a Saturday night and a Sunday morning. During that Saturday evening an employee of the plaintiffs, named Troutman, was in the plaintiff's office, in connection with the performance of his duties. About mid-night he locked the office and went home. A light was kept in the office in which the safe was located, throughout the night. The plaintiffs maintained a watch service at their premises - the watchman coming into the office by means of a key to the front door, every two hours through the night, and on each visit he looked into the various rooms on the ground floor and punched a time-clock in the rear room on that floor. There was an elevator in the rear of the premises, used to move automobiles up to the third floor of the building. At the first floor level of this elevator shaft there was a door leading out into the alley. Apparently this was a

The payment of the note given them they found the balance of \$1,000, and that this was the only money they had, and in providing for the sale of the note, the plaintiff had not exercised ordinary and reasonable care. The plaintiff contended that they had exercised such care as to amount this court in holding that the finding of the trial court on this issue was against the plaintiff and in favor of the defendant. The office of the plaintiff was located at 215 Broadway in the City of Chicago on the second floor of a five-story building. The door into which the rings were kept was located in the hallway of the office, a short distance back from a window facing on the street. The hallway took place about the middle of the block, a narrow alley and a Sunday morning. During that Saturday evening a number of the plaintiff's business men, who in the plaintiff's office, in connection with the performance of his duties. About midnight he locked the office and went home. A light was kept in the office in which the note was located, throughout the night. The plaintiff maintained a watch service at their premises - the watchman coming into the office by means of a key to the front door, every two hours, through the night, and on each visit he looked into the various rooms on the second floor and pushed a time-clock in the rear room on that floor. There was an elevator in the rear of the premises, which to move automobiles up to the third floor of the building. At the first floor of this elevator shaft there was a door leading out into the alley. Apparently this was a

steel door which moved up and down. The testimony was to the effect that when this door was lowered it would lock automatically. Troutman testified that when he left there Saturday night, he saw that all the windows and doors were locked. He testified that when he left the premises at night, he always went out through the rear door in the alley, "because it looks itself outside." The watchman testified that he went into these premises every two hours during that night and found everything all right, making his last round about 4:30 in the morning.

The first one who came to the premises on Sunday morning was Troutman. When he discovered that a burglary had taken place he called the police. He testified that he did not pay any attention to the condition of the elevator doors in the rear that Sunday morning, - "the police examined all that themselves. I went back in the shop" (which was a room in the rear on the ground floor) "The elevator doors inside were closed; they could have opened it." One of the police officers who answered the call sent into the police station and came to the premises of the plaintiffs, testified that they made a thorough investigation of the premises to see, if possible, how entrance to them had been accomplished, "and in our investigation we saw that large iron door which was in the rear of the place was open -- it was slightly opened from the bottom, it is a door that rolled up. A large metal door." He said he did not know whether it was the elevator door that led out into the alley - "I imagine it was a door the same as a garage entrance would be." He testified further that

effect door which covered up the door. The testimony was to
the effect that when this door was lowered it would lock
automatically. Testimony testified that when he left there
Saturday night, he saw that all the windows and doors were
locked. He testified that when he left the premises at
night, he always went out through the rear door in the
alley. Because he looked inside outside. The testimony
testified that he went into these premises every two hours
during that night and found everything all right, making
his last round about 6:30 in the morning.
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tor doors in the rear that Sunday morning. - "The police
examined all that themselves. I went back in the afternoon"
(which was a room in the rear on the ground floor) "the
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them had been accomplished, "and in my investigation we
saw that there was a door which was in the rear of the place
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a door that rolled up. A large metal door. He said he
did not know whether it was the elevator door that led out
into the alley -- "I imagine it was a door the same as a
garage entrance would be." He testified further that

this door was up a few inches and could have been raised further, as it was not locked; that there was no other apparent means of effecting an entrance. - "No windows broken or doors jimmied or anything else," and therefore "we presumed that was the way entrance was effected;" and that Troutman told him of an employee who was employed about there was a watchman or assistant mechanic and who had been in the habit of sleeping on the premises some times, and the officers attempted to locate this man but without success. The officers learned of the watch service maintained by the plaintiffs, and they testified that they expected to learn, by an examination of the time-clock when the watchman had last registered there, and in this way they expected to be able to fix the time of the burglary, within certain limits, but when they examined the card or diaphragm in the time-clock "there were so many holes perforated that it was impossible to determine when he was there last." It would seem from the testimony of these officers that the diaphragm or card had not been removed from the clock for some time. On cross-examination the officer testified that the big metal door which they found open in the rear, did not have any marks on it and did not appear to have been jimmied or forced open. In our opinion, the foregoing evidence is such as to justify a finding to the effect that the plaintiffs did not exercise the degree of care required of them as pledgees of valuables deposited with them as security.

In support of their appeal the plaintiffs further contend that to warrant the allowance of set-off, the demands of the respective parties must be mutual and that this is not

This door was up a few inches and would have been closed
further, as it was not locked, that there was no other
apparent means of effecting escape, - "No window broken
or door forced or anything else," and therefore "we pro-
posed that was the very entrance was effected," and that
Thompson told him of an employee who was employed about
there as a watchman or equivalent mechanic and who had been
in the habit of sleeping on the premises some times, and
the officers attempted to locate this man but without
success. The officers learned of the watchman's name
called by the plaintiffs, and they testified that they
expected to locate him by an examination of the time-book when
the watchman had last registered there, and in this way
they expected to be able to fix the time of the burglary.
Within certain limits, but when they examined the card
or dispatch in the time-book there were no entry there
pertaining to it was impossible to determine when he was
there last. It would seem from the testimony of these
officers that the dispatch or card had not been removed
from the book for some time. Of cross-examination the
officers testified that the big metal door which they found
open in the next, did not have any marks on it and did not
appear to have been forced or forced open. In our opinion,
the foregoing evidence is such as to justify a finding to
the effect that the plaintiffs did not exercise the degree of
care required of them as policemen or vigilantes deposited
with them as security.

In support of their report the plaintiffs further
contended that to secure the assistance of such, the demands
of the respective parties must be mutual and that this is not

the case here, inasmuch as the action brought by the plaintiffs is against the defendant alone and the demands sought to be set off against the suit of the plaintiffs cannot be said to be mutual, inasmuch as only one of the rings which are the subject of the claim for set-off, interposed by the defendant, belonged to him, and the others belonged to Mrs. Mack, who is not a party defendant. In other words, it is the contention of the plaintiffs that any claim against them for the value of the rings is in the nature of a joint claim, on the part of both the defendant and Mrs. Mack, and, therefore, it cannot be set-off in an action brought by the plaintiffs against the defendant. Conceding the legal proposition contended for, we are of the opinion that the plaintiffs are not in a position to urge it here, inasmuch as no such question was properly raised in the trial court. When the defendant interposed his claim for set-off, the plaintiffs did not move to strike it on the ground of lack of mutuality. They filed their affidavit of merits in response to the defendant's claim for set-off, in which they alleged that they had a good defense to the whole of the defendant's demand, which defense they proceeded to set forth. They denied in their affidavit of merits that the defendant had delivered to them as collateral security the various rings mentioned by him in his affidavit of claim for set-off, but they alleged that they had made a loan to the defendant and evidencing such loan they had taken his note in the sum of \$1167, and that as a condition precedent to the making of the loan they had demanded that Mrs. Mack join with him in the execution of a note; and that in addition to the chattel mortgage covering the defendant's automobile he should deposit as collateral security on the note a certain

the same party, inasmuch as the action brought by the plain-
 tiff is against the defendant alone and the defendant sought
 to be set off against the suit of the plaintiff cannot be
 said to be mutual, inasmuch as only one of the things which
 are the subject of the claim for set-off, inasmuch as the
 defendant, belonged to him, and the others belonged to Mrs.
 L., who is not a party defendant. In other words, it is
 the contention of the plaintiff that any claim against
 him for the value of the things is in the nature of a joint
 claim, on the part of both the defendant and Mrs. Wood, and,
 therefore, it cannot be set-off in an action brought by the
 plaintiff against the defendant. Concerning the legal pro-
 position contended for, we are of the opinion that the plain-
 tiff was not in a position to raise it here, inasmuch as
 no such question was properly raised in the trial court.
 When the defendant introduced his claim for set-off, the
 plaintiff did not move to strike it on the ground of lack
 of mutuality. They filed their affidavits of service in re-
 sponse to the defendant's claim for set-off, in which they
 alleged that they had a good defense to the claim at the
 defendant's demand, which defense they proceeded to set forth.
 They denied in their affidavits of service that the defendant
 had delivered to them an electrical security the various
 things mentioned by him in his affidavit of claim for set-
 off. But they alleged that they had made a loan to the defend-
 ant and advancing such loan they had taken his note in the
 sum of \$1000, and that as a condition precedent to the
 making of the loan they had demanded that Mrs. Wood join
 with him in the execution of a note; and that in addition to
 the check certificate covering the defendant's automobile he
 should deposit an electrical security on the note a certain

diamond ring and that Mrs. Mack should deposit, as further collateral security for the payment of the note, certain other rings which were set forth; and that this collateral was deposited as security on this note. They then set up the alleged facts surrounding the burglary; acknowledged receipt of \$390.83 on account of the note, and alleged that the ring deposited by the defendant was not worth more than \$100, and those deposited by Mrs. Mack were not worth more than \$300. No suggestion was made that the plaintiffs took the position that the claim which the defendant was interposing by way of set-off, was not such as could be interposed under the law. Furthermore, so far as the record shows, at no time during the introduction of the testimony was any objection raised to any testimony offered in behalf of the defendant, on this ground, and much of it was objectionable on the theory which the plaintiffs now seek to urge.

We are moreover of the opinion that the plaintiffs contention that the claims were not mutual, is untenable on the merits. It is entirely clear from the evidence in the record that the plaintiffs did not make a loan to the defendant and Mrs. Mack, but they made their loan to the defendant, and to secure themselves they insisted on more security than the defendant had to offer. Mrs. Mack, having previously loaned money to the defendant and being willing to assist him further, offered to put up some rings of hers as additional collateral, and this was agreeable to the plaintiffs, provided she joined with the defendant in signing his note. The defendant got the

disputed that Mrs. Mack should be admitted as a witness
collegiate security for the payment of the note, because that
there were two notes; and that this defendant was
admitted as a witness on this note. They then set up the
alleged facts surrounding the payment, and alleged that
out of \$100.00 on account of the note, and alleged that
the note deposited by the defendant was not worth more than
\$10.00, and these deposited by Mrs. Mack were not worth more
than \$10.00. No suggestion was made that the plaintiff's
note the position that the claim which the defendant was
interposing by way of set-off, was not such as could be
interposed under the law. Furthermore, so far as the
record shows, at no time during the introduction of the
testimony was any objection raised to any testimony offered
in behalf of the defendant, or vice versa, and none of it
was objectionable on the theory which the plaintiff was
set to rely.

As the movement of the witness and the plain-
tiff contended that the witness was not entitled, it was
remains on the matter. It is entirely clear from the evi-
dence in the record that the plaintiff did not make a
loan to the defendant and Mrs. Mack, but they made their
loan to the defendant, and to secure themselves they in-
sisted on being security from the defendant had to offer.
Mrs. Mack, having previously loaned money to the defendant
and being willing to assist him further, offered to give
up some things of hers as additional collateral, and this
was agreeable to the plaintiff, provided she joined with
the defendant in signing a note. The defendant and the

proceeds of this loan. There is no question of any kind to the contrary. If the collateral which was put up to secure the loan was lost through the negligence of the plaintiffs, such liability as there may be on their part, would run to the defendant, notwithstanding the fact that some of that collateral belonged to Mrs. Mack, she having deposited it with the plaintiffs, at the defendant's request, and as additional collateral as an accommodation to him. The fact that one of the rings belonged to the defendant and the others to Mrs. Mack is, in our opinion, immaterial. Furthermore, the point now sought to be urged by the plaintiffs was not saved by submitting the findings of fact and of law, to the court at the close of the evidence. In the first place, the court was asked to find as a matter of fact that one of the rings was the property of the defendant and was pledged by him and the others were the property of Mrs. Mack and were pledged by her. In our opinion, the court was justified in refusing that finding. As above stated, we think the findings as to who the various rings belonged to was immaterial, and that the evidence shows that the fact was they were all pledged by the defendant, those belonging to Mrs. Mack being produced by her as an accommodation to him for that purpose. For the reasons we have already set forth, we are of the opinion that the court was justified in refusing the other finding submitted, which was a finding of law, to the effect that the rings which were the property of Mrs. Mack were pledged by her and, therefore, there could be no claim for set-off interposed by the defendant in this case, based on their value.

in this case, based on their action.

could be no claim for self-defense by the defendant.

very of Mrs. Cook were pledged by her and, therefore, there-
ing at law, to the effect that the rings which were the pro-
in returning the other finding submitted, which was a find-
forth, we are of the opinion that the court was justified
him for that purpose. For the reasons we have already set
to Mrs. Cook being produced by her as an accommodation to
was they were all pledged by the defendant, these belonging
to and immaterial, and that the evidence shows that the rings
we think the findings as to who the various rings belonged
court was justified in returning that finding. As above stated,
of Mrs. Cook and were pledged by her. In our opinion, the
and was pledged by him and the others were the property
less that one of the rings was the property of the defend-
first place, the court was asked to find as a matter of
of law, to the effect that the rings were the property of
with one not covered by submitting the findings of fact and
forthwith, the point was sought to be urged by the plain-
the others to Mrs. Cook is, in our opinion, immaterial.

less that one of the rings belonged to the defendant and
additional evidence as an accommodation to him. The
the defendant, notwithstanding the fact that none of them
and liability on their part would not be
the loan was lent through the negligence of the plaintiff,
the country. If the collateral rings had not been secured
property of this loan. There is no question as to who had the

Plaintiffs further contend that the trial court erred in permitting the defendant in the course of the trial to amend his affidavit of claim for set-off, in such a way as to have the effect of increasing the ad damnum to an amount in excess of \$1,000. In support of this contention it is pointed out that the action brought by the plaintiffs against the defendant was an action of the fourth class in the Municipal Court; that the affidavit of claim for set-off, as originally filed, was one in which the defendant claimed a set-off to the extent of \$1,000, which was within that class; that when it developed in the course of the trial that one of the rings pledged by the defendant had been omitted from the claim for set-off, and defendant asked leave to amend his statement so as to include it, objection was made to the effect that this would increase the ad damnum beyond the limit of \$1,000, applicable to a case of the fourth class, and would make the defendant's counter claim a case of the first class. It is the contention of the plaintiffs that a counter claim of the first class may not be interposed in an action of the fourth class; citing Holmes v. Straus, 283 Ill. 631. In that case the Supreme Court said that "while the defendant had the right if he saw fit to do so, to bring in his counter suit for an amount exceeding one thousand dollars, the action being one of the fourth class, the court could not render judgment thereon for more than \$1,000." On that theory the contention which the plaintiffs are urging in this case becomes untenable, as the judgment which the trial court entered on the defendant's counter claim was for an amount less than \$1,000.

...the defendant in the course of the
trial to amend his affidavit of claim for set-off, in
such a way as to have the effect of increasing the amount
to an amount in excess of \$1,000. In support of this
contention it is pointed out that the action brought by the
plaintiff against the defendant was an action of the
court class in the original court; that the affidavit
of claim for set-off, as originally filed, was one in
which the defendant claimed a set-off in the sum of
\$1,000, which was at that time when it developed
in the course of the trial that one of the items claimed
by the defendant had been omitted from the claim for set-
off, and defendant asked leave to amend his statement
so as to include it, objection was made to the effect
that this would increase the set-off beyond the limit
of \$1,000, applicable to a case of the fourth class,
and would make the defendant's counter claim a case of the
fifth class. It is the contention of the plaintiff that
a counter claim of the first class may not be introduced
in an action of the fourth class; citing Holmes v.
Holmes, 228 N.Y. 221. In that case the Supreme Court
held that while the defendant had the right to amend
his set-off, he was not to be put in his counter claim for an amount
exceeding one thousand dollars, the action being one of
the fourth class. The court concluded under judgment thereon
for more than \$1,000. In that case the contention which
the plaintiff was making in this case became untenable, as
the judgment which the trial court entered on the defendant's
counter claim was for an amount less than \$1,000.

Finally, the plaintiffs contend that the judgment of the trial court should not be permitted to stand, inasmuch as it is based on a finding wherein the court not only found the issues against the plaintiff on their statement of claim but further found on the defendant's claim for set-off that the plaintiffs had been guilty of "maliciously converting property of defendant," whereas no contention to that effect had been made by the defendant either in his pleading or in his proof. The finding which the court made was in bad form for the reason urged, but we are unable to see that the plaintiffs were in any way harmed as a result of it. There was considerable discrepancy in the testimony offered as to the value of the various rings which had been deposited as collateral on this loan. It was admitted that when the burglary took place and the rings were lost, there was a balance of \$610.00 due on the note. In our opinion, the evidence in the record as to the value of the rings is such that this court could not say that it did not justify an assessment of damages on the defendant's claim for set-off in the amount found by the trial court. While the element of malicious conversion was not involved and should not have been included in the court's finding, we do not consider it sufficient ground to warrant us in disturbing the judgment appealed from.

For the reasons stated, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, F.J. AND O'CONNOR, J. CONCUR.

Typically, the plaintiff's contention that the defendant of the trial court should not be permitted to stand in-
sistence as it is based on a finding wherein the court not
only found the income against the plaintiff on their own
ment of claim but further found on the defendant's claim for
not all that the plaintiff had been guilty of willfully
converting property of defendant, whereas no suggestion to
that effect had been made by the defendant either in his
pleading or in his proof. The finding which the court made
was in fact for the reason stated, but he was unable to
see that the plaintiff's were in any way harmed as a result
of it. There was considerable discrepancy in the testimony
offered as to the value of the various rings which had been
deposited as collateral on this loan. It was admitted that
when the burglary took place and the rings were lost, there
was a release of \$10,000 due on the note. In my opinion,
the evidence in the record as to the value of the rings is
such that this court could not say that it did not testify
an assessment of damages on the defendant's claim for recovery
in the amount found by the trial court. While the elements
of actual conversion are not involved and should not have
been included in the court's finding, we do not consider it
erroneous ground to warrant us in disturbing the judgment
appealed from.

For the reasons stated, the judgment of the trial court is affirmed.

REVEREND JUSTICE

218 - 31350

MARTIN REGALSKI, et al,

Appellees,

v.

WLADYSLAW ADAMKIEWICZ, et al,

Appellants.

2451A/620#3

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Monday, June 13, 1927.

MR. JUSTICE THOMSON delivered the opinion of the court.

Martin Regalski and his wife filed a bill in the Superior Court of Cook County, to remove, as a cloud upon their title to certain property they had purchased from the defendants, Wladyslaw Adamkiewicz and his wife, a trust deed purporting to be a junior encumbrance upon the property, to secure notes amounting to \$6,000. The defendants filed an answer to the bill of the complainants, and also a cross-bill, wherein they in turn sought to foreclose the trust deed in question. The complainants filed their answer to the cross-bill, and on the issues thus formed on the bill and cross-bill, the evidence was presented, after which a decree was entered declaring the trust deed fraudulent and removing it as a cloud, as prayed for, and dismissing the cross-bill for want of equity. The defendants have perfected this appeal from that decree.

The evidence discloses that there was a concern known as the Union Real Estate Company, composed of four individuals. One of these was a man named Skwirut, and another was Stanley Adamkiewicz, a distant relative of the

080 1/4 1/2 3/4 1 1 1/2 2 2 1/2 3 3 1/2 4 4 1/2 5 5 1/2 6 6 1/2 7 7 1/2 8 8 1/2 9 9 1/2 10 10 1/2 11 11 1/2 12 12 1/2 13 13 1/2 14 14 1/2 15 15 1/2 16 16 1/2 17 17 1/2 18 18 1/2 19 19 1/2 20 20 1/2 21 21 1/2 22 22 1/2 23 23 1/2 24 24 1/2 25 25 1/2 26 26 1/2 27 27 1/2 28 28 1/2 29 29 1/2 30 30 1/2 31 31 1/2 32 32 1/2 33 33 1/2 34 34 1/2 35 35 1/2 36 36 1/2 37 37 1/2 38 38 1/2 39 39 1/2 40 40 1/2 41 41 1/2 42 42 1/2 43 43 1/2 44 44 1/2 45 45 1/2 46 46 1/2 47 47 1/2 48 48 1/2 49 49 1/2 50 50 1/2 51 51 1/2 52 52 1/2 53 53 1/2 54 54 1/2 55 55 1/2 56 56 1/2 57 57 1/2 58 58 1/2 59 59 1/2 60 60 1/2 61 61 1/2 62 62 1/2 63 63 1/2 64 64 1/2 65 65 1/2 66 66 1/2 67 67 1/2 68 68 1/2 69 69 1/2 70 70 1/2 71 71 1/2 72 72 1/2 73 73 1/2 74 74 1/2 75 75 1/2 76 76 1/2 77 77 1/2 78 78 1/2 79 79 1/2 80 80 1/2 81 81 1/2 82 82 1/2 83 83 1/2 84 84 1/2 85 85 1/2 86 86 1/2 87 87 1/2 88 88 1/2 89 89 1/2 90 90 1/2 91 91 1/2 92 92 1/2 93 93 1/2 94 94 1/2 95 95 1/2 96 96 1/2 97 97 1/2 98 98 1/2 99 99 1/2 100 100 1/2 101 101 1/2 102 102 1/2 103 103 1/2 104 104 1/2 105 105 1/2 106 106 1/2 107 107 1/2 108 108 1/2 109 109 1/2 110 110 1/2 111 111 1/2 112 112 1/2 113 113 1/2 114 114 1/2 115 115 1/2 116 116 1/2 117 117 1/2 118 118 1/2 119 119 1/2 120 120 1/2 121 121 1/2 122 122 1/2 123 123 1/2 124 124 1/2 125 125 1/2 126 126 1/2 127 127 1/2 128 128 1/2 129 129 1/2 130 130 1/2 131 131 1/2 132 132 1/2 133 133 1/2 134 134 1/2 135 135 1/2 136 136 1/2 137 137 1/2 138 138 1/2 139 139 1/2 140 140 1/2 141 141 1/2 142 142 1/2 143 143 1/2 144 144 1/2 145 145 1/2 146 146 1/2 147 147 1/2 148 148 1/2 149 149 1/2 150 150 1/2 151 151 1/2 152 152 1/2 153 153 1/2 154 154 1/2 155 155 1/2 156 156 1/2 157 157 1/2 158 158 1/2 159 159 1/2 160 160 1/2 161 161 1/2 162 162 1/2 163 163 1/2 164 164 1/2 165 165 1/2 166 166 1/2 167 167 1/2 168 168 1/2 169 169 1/2 170 170 1/2 171 171 1/2 172 172 1/2 173 173 1/2 174 174 1/2 175 175 1/2 176 176 1/2 177 177 1/2 178 178 1/2 179 179 1/2 180 180 1/2 181 181 1/2 182 182 1/2 183 183 1/2 184 184 1/2 185 185 1/2 186 186 1/2 187 187 1/2 188 188 1/2 189 189 1/2 190 190 1/2 191 191 1/2 192 192 1/2 193 193 1/2 194 194 1/2 195 195 1/2 196 196 1/2 197 197 1/2 198 198 1/2 199 199 1/2 200 200 1/2 201 201 1/2 202 202 1/2 203 203 1/2 204 204 1/2 205 205 1/2 206 206 1/2 207 207 1/2 208 208 1/2 209 209 1/2 210 210 1/2 211 211 1/2 212 212 1/2 213 213 1/2 214 214 1/2 215 215 1/2 216 216 1/2 217 217 1/2 218 218 1/2 219 219 1/2 220 220 1/2 221 221 1/2 222 222 1/2 223 223 1/2 224 224 1/2 225 225 1/2 226 226 1/2 227 227 1/2 228 228 1/2 229 229 1/2 230 230 1/2 231 231 1/2 232 232 1/2 233 233 1/2 234 234 1/2 235 235 1/2 236 236 1/2 237 237 1/2 238 238 1/2 239 239 1/2 240 240 1/2 241 241 1/2 242 242 1/2 243 243 1/2 244 244 1/2 245 245 1/2 246 246 1/2 247 247 1/2 248 248 1/2 249 249 1/2 250 250 1/2 251 251 1/2 252 252 1/2 253 253 1/2 254 254 1/2 255 255 1/2 256 256 1/2 257 257 1/2 258 258 1/2 259 259 1/2 260 260 1/2 261 261 1/2 262 262 1/2 263 263 1/2 264 264 1/2 265 265 1/2 266 266 1/2 267 267 1/2 268 268 1/2 269 269 1/2 270 270 1/2 271 271 1/2 272 272 1/2 273 273 1/2 274 274 1/2 275 275 1/2 276 276 1/2 277 277 1/2 278 278 1/2 279 279 1/2 280 280 1/2 281 281 1/2 282 282 1/2 283 283 1/2 284 284 1/2 285 285 1/2 286 286 1/2 287 287 1/2 288 288 1/2 289 289 1/2 290 290 1/2 291 291 1/2 292 292 1/2 293 293 1/2 294 294 1/2 295 295 1/2 296 296 1/2 297 297 1/2 298 298 1/2 299 299 1/2 300 300 1/2 301 301 1/2 302 302 1/2 303 303 1/2 304 304 1/2 305 305 1/2 306 306 1/2 307 307 1/2 308 308 1/2 309 309 1/2 310 310 1/2 311 311 1/2 312 312 1/2 313 313 1/2 314 314 1/2 315 315 1/2 316 316 1/2 317 317 1/2 318 318 1/2 319 319 1/2 320 320 1/2 321 321 1/2 322 322 1/2 323 323 1/2 324 324 1/2 325 325 1/2 326 326 1/2 327 327 1/2 328 328 1/2 329 329 1/2 330 330 1/2 331 331 1/2 332 332 1/2 333 333 1/2 334 334 1/2 335 335 1/2 336 336 1/2 337 337 1/2 338 338 1/2 339 339 1/2 340 340 1/2 341 341 1/2 342 342 1/2 343 343 1/2 344 344 1/2 345 345 1/2 346 346 1/2 347 347 1/2 348 348 1/2 349 349 1/2 350 350 1/2 351 351 1/2 352 352 1/2 353 353 1/2 354 354 1/2 355 355 1/2 356 356 1/2 357 357 1/2 358 358 1/

THE UNIVERSITY OF CHICAGO

Continon filed Monday, June 13, 1957.

1990 年 12 月 10 日

Another was George Abrahamson, a distant relative of the
Lindberghs. One of these was a man named Melvin, and
James H. Lee, John Edgar Hoover, and several of Paul

defendant Wladyslaw Adamkiewicz. This company had some property owned by Wladyslaw Adamkiewicz and wife, listed for sale or exchange. Skwirut had a number of talks with the complainants concerning a piece of property they owned, and finally, an exchange of these two pieces of property was arranged.

It appears from the evidence that a lawyer named Nyka represented both sides in connection with this exchange. His office was in the same building as that of the Real Estate Company. The complainants had previously had occasion to seek legal advice on other matters, and when the deal involved in this case arose, Mrs. Regalski said something about consulting their attorney, whereupon, she testified, Skwirut spoke up and said, "Here's a lawyer here," and recommended Nyka. A written contract was drawn up and executed by the respective parties, and in that contract the defendants agreed to convey their property, "subject to a first mortgage of \$4,000, and subject to a second mortgage in the sum of \$6,000." Neither of the complainants could read or write the English language. Subsequently, the parties met and closed their transaction. Complainants claim that they later discovered, for the first time, that the property they had taken in exchange from the defendants, was encumbered by the \$6,000 mortgage, and they then filed this bill, contending it to be fraudulent, and asking that it be so declared and that a decree be entered removing it as a cloud on their title.

In support of their appeal the defendants first contend that the decree is against the manifest weight of the evidence. There is much testimony in the record, which is

defendant's affidavit. This company had some property owned by defendant's affidavit and wife, listed for sale or exchange. Plaintiff had a number of sales with the company, maintaining a place of property in the city and vicinity, an exchange at these two places at property was arranged.

It appears from the evidence that a lawyer named Hyde represented both sides in connection with this exchange. His office was in the same building as that of the Real Estate Company. The complainant had previously had some for so much legal advice on other matters, and when the deal involved in this case arose, Mrs. Regalini said something about consulting their attorney, whereupon, she testified, Plaintiff came up and said, "Here's a lawyer here," and recommended him. A written contract was drawn up and executed by the respective parties, and in that contract the defendant agreed to convey their property, subject to a first mortgage of \$4,000, and subject to a second mortgage in the sum of \$2,000. Neither of the complainants said read or wrote the English language. Subsequently, the parties met and signed their transaction. Complainants claim that they later discovered, for the first time, that the property they had taken in exchange from the defendant, was encumbered by the \$4,000 mortgage, and they then filed this bill, claiming it to be fraudulent, and asking that it be declared void and that a decree be entered removing it as a cloud on their title.

In support of their appeal the defendant's first contention is that the decree is against the manifest weight of the evidence. This case testimony in the record, which is

in sharp conflict. That perjury was committed by one side or the other in this case is amply demonstrated. In that sort of a situation there are two things which may be of great assistance to a court in determining where the truth lies. One is to be found in the appearance and behavior of the various witnesses as they are testifying in the trial court on the witness stand. The chancellor had the advantage of that element in the case, whereas we are without it. We are obliged, therefore, in such a situation, to rely quite largely upon the finding of the chancellor, who reached his conclusion with the benefit and advantage which that element in the case affords. The other matter which is of assistance in such situations, in determining where the truth lies, may be found in such circumstances as may be disclosed, which may have material significance on the question of the reasonableness or probability of the contentions of one side or the other, or their unreasonableness or improbability. There are quite a few such in the case at bar, to which we shall refer later.

There is nothing in the record tending to show that the complainants could either read or write the English language. They both testified they could not, except that Martin Regalski could write his name. The complainants both testified that there was a \$4,000 mortgage on their property and that they were told there was a \$4,000 mortgage on the Adamkiewicz property; but that no mention was made of any second mortgage for \$6,000, at any time by anybody. The contract as it appears in the record shows a signature "Jan Zabawa", apparently as a witness. There was a man named John Zabawa who testified that this was his signature and that

in that trial. The jury was instructed by the judge
of the fact in this case is only circumstantial. In the
fact of a situation there are two things which may be
great evidence to a jury in determining where the truth
lies. One is to be found in the statements and behavior
of the various witnesses as they are testifying in the trial
court on the witness stand. The prosecutor had the advantage
of that element in the case, whereas we are without it.
We are obliged, therefore, in such a situation, to rely quite
largely upon the finding of the chancellor, who reached his
conclusion with the benefit and advantage which that element
in the case afforded. The other matter which is of assistance
in such situations, in determining where the truth lies,
may be found in such circumstances as may be disclosed, which
we have carefully attention on the question of the reason-
ableness or probability of the contention of one side or
the other, or their unreasonableness or improbability. There
are cases in law which in the case at bar, we wish to call
your attention.

There is nothing in the record tending to show that the complainants would either read or write the English language, they both testified they could not, except that Maria Bogalski could write his name. The complainants both testified that there was a \$4,000 mortgage on their property and that they were told there was a \$4,000 mortgage on the American property; but that no mention was made of any second mortgage for \$4,000, at any time by anybody. The contract as it appears in the record shows a signature "John Bahner", apparently as a witness. There was a man named John Bahner who testified that this was his signature and that

he signed the contract in the presence of both complainants, in the office of Skwirut; that Mrs. Regalski had taken him over to the office that morning for the purpose of acting as a witness. He further testified that at the time the contract was signed, he heard Skwirut mention both the first and the second mortgage, for \$4,000 and \$6,000 respectively. The evidence shows without contradiction that Zabawa had been an inmate of the Dunning Insane Asylum. Martin Regalski testified that he ran away from there and came to their home and they kept him for a short time, but he was not living there at the time this contract was entered into. He had moved elsewhere a short time before that. Mrs. Regalski testified that Zabawa was not present when the contract was signed. She also testified (without objection) that Skwirut had given Zabawa \$50 to testify in this case. Martin Regalski also testified that Zabawa did not sign the contract, as a witness, in his presence. Zabawa was asked on cross-examination whether he had had any trouble with the complainants, and he said that he had had no trouble, "just only \$60.00, that is all * * * I have got coming \$60 from Mr. Regalski. I am satisfied to get my money."

Both complainants testified that they first discovered the \$6,000 mortgage after the deal had been closed, when they received their papers, including a written opinion of title by the lawyer, Nyka, who had been acting for them, in which he mentioned the fact that the property being conveyed by Adamkiewicz was subject to this \$6,000 encumbrance. Nyka testified for the defendants. He admitted that he had not given the complainants his written opinion of title until after the deal had been closed, but he

be signed the mortgage in the presence of two witnesses,
in the office of the notary; that the mortgage was then
given to the office that morning for the purpose of being
as a witness. The witness testified that at that time the
mortgage was signed, he heard the witness mention both the first
and the second mortgages, for \$5,000 and \$2,000 respectively.
The witness spoke without contradiction that he had been
seen at the house of the Housing Improvement. The witness testified
that he ran away from there and went to their home
and they kept him for a short time, but he was not living
there at the time the contract was entered into. He had
moved elsewhere a short time before that. Mrs. Reginald
testified that he was not present when the mortgage
was signed. She also testified (without objection) that
he had not given before her as a witness in this case. The witness
Reginald also testified that he had not signed the mortgage,
as a witness, in the presence of the witness. The witness
on cross-examination whether he had had any trouble with
the complainants, and he said that he had had no trouble,
"just only \$500.00, that is all * * * I have got money."
The witness Reginald. I am satisfied to put my money."
With complainants testified that they have
discussed the \$5,000 mortgage after the deal had been
closed, when they received their papers, including a
written opinion of title by the lawyer. They had been
acting for them, in which he mentioned the fact that the
property being conveyed by complainants was subject to this
\$5,000 mortgage. The witness for the defendant
He testified that he had not given the complainants his written
opinion of title until after the deal had been closed, but he

testified he notified them as to the substance of it orally prior to that time. He also said that at the time the written contract was executed by the parties, which was May 28, 1924, he read the entire contract to the complainants in English and then translated it into Polish, and in that connection he called their attention to both the \$4,000 mortgage and the second mortgage for \$6,000, and that they understood it. This \$6,000 mortgage was dated June 8, 1924. Late in November of that year, Nyka, representing Adamkiewicz, wrote a letter to the complainants notifying them of the interest that would shortly be due on this mortgage. Nyka admitted that a few days afterwards Mrs. Regalski came to his office with a friend, and she told him that she had not assumed any such mortgage and he told her that the contrary was the fact and showed her the contract, and that she then took the position that she not owe the \$6,000 but that all she owed was \$5,000. Mrs. Regalski said she never told Nyka she understood it was \$5,000 and not \$6,000.

Regalski testified that after the deal had been closed and he received his papers from Nyka he brought them home and that a man named Fisher, who was rooming in the Regalski home, asked if they had received their papers and Regalski said he had, and showed them to Fisher, who looked them over; and Fisher then suggested that he thought he ought to take them to some other lawyer and see if they were all right, and Fisher recommended a lawyer named Quinlan, who was connected with the firm who ultimately represented the complainants in this case. It appears that when the complainant

was connected with the firm the witnesses represented the
all rights, and Fisher represented lawyer named (name), who
ought to take them to some other lawyer and see if they were
right over; and Fisher then suggested that he thought he
Nagelski said he had, and showed them to Fisher, who looked
Nagelski home, asked if they had received their papers and
home and that a man named Fisher, who was working in the
closed and he received his papers from them he brought them
Nagelski testified that after the deal had been
\$2,000 and was \$2,000.
Nagelski said he never told him the understood it was
and was the \$2,000 but that all the work was \$2,000. Was
but the money, and that was how the money was that he
and he told her that the country was the fact and showed
and she told him that she had not received any work money
Nagelski was in his office with a friend,
he was on his way out, when he said that a few days
Nagelski testified that at the interest that would shortly
Fisher, representing Nagelski, wrote a letter to the com-
was dated June 8, 1934. Late in November of that year,
\$2,000, and that they understood it. This is the entire
both the \$2,000 money, and the second money for
and in that connection he called their attention to
consideration in English and then translated it into Italian,
was May 22, 1934, he read the entire document to the
the witness testified was executed by the parties, which
entirely proper on that date. He also said that at the time
testified he received them as a his deposition at is

thus consulted a new lawyer and he looked over the papers and talked with the complainants, he looked into the title of the property they had taken in exchange, and saw that the \$6,000 mortgage was recorded. Quinlan and Fisher, whether with or without Martin Regalski is not clear, then went to see Adamkiewicz and asked him about this second mortgage of \$6,000. Both Quinlan and Fisher appeared as witnesses for the complainants in this case and both testified that Adamkiewicz said he didn't know anything about such a mortgage. This testimony was not denied by Adamkiewicz. When the deal was closed Nyka prepared a statement of the amounts with which each party was to be credited, in connection with the closing of the deal, and in the list of Regalski's credits he included earned interest on both the \$4,000 and the \$6,000 mortgages.

The defendant Adamkiewicz testified that when the contract was executed Skwirut was the one who read it through to the complainants, first in English and then in Polish, and that he asked the complainants how they wanted to pay the second mortgage off, and he told them that maybe they were taking on too much, but that Mrs. Regalski explained that she intended to go to work and help her husband pay it. Both Adamkiewicz and his wife, and also his daughter testified that shortly after this deal was closed Mrs. Regalski came over to their home making some inquiries about this second mortgage. Mrs. Adamkiewicz testified that "she asked where she should make the payment on the second mortgage. My husband told her to make it at Nyka's office." This is alleged to have occurred a few days after the deal was closed, which would make it the last of the first week

three contacted a new lawyer and he looked over the papers
and talked with the complainant, he looked into the title
of the property they had taken in exchange, and saw that
the \$2,000 mortgage was recorded. Gwin and Fisher,
whether with or without their father in law, then
went to see Administrator and asked him about this second
mortgage of \$2,000. Both Gwin and Fisher appeared
as witnesses for the complainant in this case and both
testified that Administrator said he didn't know anything
about a mortgage. This testimony was not denied
by Administrator. When the deal was closed Wynn prepared
a statement of the amounts with which each party was to be
credited, in connection with the closing of the deal.
and a list of Wynn's credits he included turned
interest on both the \$1,000 and the \$2,000 mortgages.
The following testimony was given when
the matter was brought before the one who had it
through to the complainant, Wynn in English and then in
Polish, and that he asked the complainant how they wanted
to pay the second mortgage off, and he told them that maybe
they were taking on too much, but that Mrs. Wynn said explain
to him the intended to go to work and help her husband pay
it. Both Administrator and his wife, and also his daughter
testified that shortly after this deal was closed Mrs. Wynn
all came over to their home making some inquiries about
this second mortgage. Mrs. Administrator testified that "she
asked where the money was the payment on the second mort-
gage. Wynn told her to make it at Wynn's office."
This is alleged to have occurred a few days after the deal
was closed, which would make it the last of the first week

in August. It seems strange that Mrs. Negalski should be making inquiries about the payment of interest on the second mortgage which would not be due under the terms of the notes until some time in December.

Skwirut also testified that he was the one who read the contract to the complainants - all of the important provisions - first in English and then in Polish.

So much for the conflicts in the testimony. We will now refer to a number of peculiar circumstances disclosed by the testimony, all of which, in our opinion, are significant, and all of which are unfavorable to the contentions of the defendants, and some of which tend very strongly to show that the \$8,000 mortgage in question was a fraud. It is quite true, as the defendants contend, that fraud will not be presumed. It is equally true that it is not necessary to establish fraud by direct evidence, before a court will be warranted in finding that it existed. Parties who are guilty of perpetrating fraudulent transactions, are never found announcing the fact expressly. In almost every such case the nature of the transaction must be established, in whole or in part, by the attendant circumstances, which frequently are such as to indicate its true character.

In the case at bar the uncontradicted evidence is to the effect that the property which the complainants conveyed on this deal was reasonably worth the sum of \$18,000 at the time in question, while the property which they received in trade was reasonably worth \$12,500. This testimony was given by a witness, of experience in appraising

in August. It seems strange that the defendant should be
suing plaintiffs about the payment of interest on the
second mortgage which would not be due until the year of
the note until some time in December.

Defendant also testified that he was the one who
read the contract to the complainants - all at the important
provisions - first in English and then in Polish.

He made the contract in the testimony. He
will now refer to a number of peculiar circumstances dis-
closed by the testimony, all of which, in my opinion,
are significant, and all of which are unfavorable to the de-
fendant of the defendant, and some of which I will very
strongly to show that the \$2,000 mortgage is a question of
fact. It is quite true, as the defendant contends,
that there will not be produced. It is equally true that
it is not necessary to establish that by direct evidence,
before a court will be concerned in finding that it existed.
Further the one guilty of representing fraudulent transactions,

are never found among the fact expressly. In almost
every case the extent of the transaction may be ascer-
tained, in whole or in part, by the attendant circumstances,
which frequently are such as to indicate the true character.

In the case of the unauthenticated evidence is
to the effect that the property which the complainants con-
veyed on this date was worth the sum of \$12,000
of the time in question, while the property which they re-
ceived in return was worth only \$1,500. This testi-
mony was given by witnesses, of experience in appraising

property, who had been engaged in buying and selling real estate in Chicago for fifteen years. He was a member of the valuation committee of the Chicago Real Estate Board. No testimony was submitted either tending to discredit him or contradict his statements. There was testimony to the effect that when complainants purchased their property some time before but how long is not shown, they paid \$10,000 for it. When the deal involved in the case at bar was closed the deed executed by complainants did not run to Adamkiewicz but to one Baran. There was testimony to the effect that Adamkiewicz had said he received \$19,000 from Baran. The contract which was drawn up on this deal, however, recited that the complainants agreed to convey their property at a consideration of \$20,750, subject to a first mortgage of \$4,000 and further, that the defendants agreed to convey their property to the complainants at a consideration of \$26,000, subject to a first mortgage of \$4,000 and to a second mortgage of \$2,000. Where the undisputed evidence is that the complainants' property was worth \$18,000 and the defendants' was worth \$12,500, and the contract puts the complainants' property in at \$20,750, and the defendants' at \$26,000, the undisputed testimony being to the effect that the complainants could neither read or write the English language, to say the least, the deal looks peculiar at the very start.

It will further be noted that on May 28, 1924, when that contract was executed, there was no second mortgage on the Adamkiewicz property. That mortgage was not put on the property until June 6, after the complainants had been

property, who had been engaged in buying and selling real
estate in Chicago for fifteen years. He was a member of
the real estate committee of the Chicago Real Estate Board.
His testimony was submitted after reading to himself his
or contradicted his statements. There was testimony to the
effect that some complainants retained their property and
time before any law is not shown. They said \$10,000
for it. When the deal involved is, the case as they was
placed the fact extended by complainants did not run to
Admission but to one person. There was testimony to the
effect that complainants had said he received \$10,000 from
them. The contract which was drawn up on this deal, however,
testified that the complainants agreed to convey their property
at a consideration of \$20,750, subject to a first mortgage
of \$4,000 and further, that the defendants agreed to convey
their property to the complainants at a consideration of
\$20,000, subject to a first mortgage of \$4,000 and to a
second mortgage of \$6,000. Where the undisputed evidence
is that the complainants' property was worth \$15,000 and the
defendants' was worth \$15,000, and the contract gave the
complainants' property in at \$20,750, and the defendants' at
\$20,000, the undisputed testimony being to the effect that
the complainants would not have sold or given the English
language, to say the least, the deal looks peculiar at the
very start.

It will further be noted that on May 28, 1924,
when that contract was executed, there was no second mortgage
on that Admission property. That mortgage was not put on
the property until June 2, after the complainants had been

sent to Nyka who was to represent them in this transaction as their lawyer. If the property of the defendants, which was to go in on this deal, was worth approximately \$6,000 more than the property of the complainants, as the contract recites, the usual thing to expect would be for the defendants to take back a \$6,000 purchase money mortgage from the complainants. But instead of that, in this case we find the defendants putting on the second mortgage and agreeing to pay the complainants a cash balance of \$750 to close the deal.

We now come to what, in our opinion, is the strangest circumstances of all, which is, that this second mortgage of \$8,000 was put on the property by having the defendant Adamkiewicz and his wife execute notes to the extent of \$8,000, payable to themselves, and a trust deed to secure their payment which ran to Nyka's wife as trustee. They then delivered the notes to Nyka, who admits that he was acting as attorney for the defendants in preparing the papers in connection with the second mortgage; and a few days later, Nyka returned the notes to Adamkiewicz and his wife, the makers of the notes, who have had them ever since and who still own them, according to their own testimony. The explanation of this strange transaction, given by Skwirut in his testimony, was that he explained to the complainants that the difference in figures between the two pieces of property was \$8,000, and he asked them if they would have enough money to pay that to Adamkiewicz, and they told him that they did not have it, whereupon, he turned to Adamkiewicz and said: "Will you leave your second mortgage on your property for them?" and he said he would.

... to him and was to represent him in this transaction as their lawyer. If the property of the defendant, which was to be in this deal, was worth approximately \$2,000 more than the property of the complainant, as the complainant, the usual thing to expect would be for the defendant to take back a \$2,000 mortgage money note from the complainant. But instead of that, in this case we find the defendant putting on the second mortgage and agreeing to pay the complainant a cash balance of \$750 to cover the deal.

Now come to what, in our opinion, is the strongest circumstance of all, which is, that this second mortgage of \$2,000 was put on the property by having the defendant, Adambleson and his wife execute notes to the extent of \$2,000, payable to themselves, and a trust deed to secure their payment which ran to Wynn's wife as trustee. They then delivered the notes to Wynn, who admits that he was acting as attorney for the defendant in preparing the papers in connection with the second mortgage; and a few days later, Wynn returned the notes to Adambleson and his wife, the makers of the notes, who have had them ever since and who still own them, according to their own testimony. The explanation of this strange transaction, given by Wynn in his testimony, was that he explained to the complainant that the difference in value between the two pieces of property was \$2,000, and he asked them if they would have enough money to pay that to Adambleson, and they told him that they did not have it, whereupon he turned to Adambleson and said: "Will you please give your second mortgage on your property for them?" and he said he would.

The witness then said he turned to Regalski and said: "If he (is) going to leave the \$6,000 to you, you have to sign the mortgage papers," but that Regalski said he would not sign, so the witness merely remarked, "Somebody has got to sign,- either side. Mr. Adamkiewicz will you sign? He said: Don't make no difference. And they agreed on that condition." But there was no contradiction of the fact that the parties agreed that the defendants were to pay a cash balance of \$750 when the deal was closed; and such a payment was included in the figures at that time. Nyka's explanation of this mortgage was that he told Regalski at the time the deal was closed that this mortgage had been signed by Adamkiewicz after the contract had been entered into; that Mrs. Regalski asked if it was all right and he said that it didn't make any difference; that he told the complainants that Adamkiewicz had come to him on June 6, and said it would be best for the complainants to execute this mortgage; that the witness said it made no difference to him, so Adamkiewicz went to see a lawyer named Zaremba and Zaremba advised him to execute a mortgage and that he, the witness, told the complainants "It was better for us to assume that mortgage without their signature." And yet, this witness testified that he had read the entire contract of exchange to the complainants on May 28, when it was executed, being careful to read it in Polish as well as in English, and had explained to them at that time that they were obliged to assume not only a \$4,000 mortgage but a second mortgage of \$6,000, payable \$600 every six months; and that the complainants understood all about it. Nyka admitted on cross-examination that the method pursued by the defendants in connection with this second mort-

The witness then said he turned to Nagelski and said: "If he (is) going to leave the \$5,000 to you, you have to sign the mortgage papers," but that Nagelski said he would not sign, so the witness merely remarked, "Somebody has got to sign -- either you, Mr. Adamson or will you sign? He said: Don't make no difference, and they agreed on that condition." But there was no contradiction of the fact that the parties agreed that the debt should be paid to pay a cash balance of \$500 when the deal was closed; and such a payment was included in the figures at that time. The explanation of this mortgage was that he told Nagelski at the time the deal was signed that this mortgage had been signed by Adamson after the matter had been settled; that Mr. Nagelski asked if it was all right and he said that he didn't make any difference; that he told the complainant that Adamson had come to him at time B, and said it would be best for the complainant to execute this mortgage; that the witness said it made no difference to him, so Adamson went there a lawyer would handle the matter; that he told the witness a mortgage and that he, the witness, told the complainant "It was better for me to receive that mortgage without their signature." And yet, this witness testified that he had read the entire contract of exchange to the complainant on May 25, when it was executed, being careful to read it in Polish as well as in English, and had explained to them at that time that they were obliged to receive not only a \$5,000 mortgage but a second mortgage of \$5,000, payable \$500 every six months; and that the complainant understood all about it. This admitted on cross-examination that the method pursued by the defendant in connection with this second mort-

gage, was not the usual way of making a purchase money mortgage, but that he had sometimes done it that way.

Nyka testified he did not have anything to do with the drawing of the original contract. It appears from the record, without any question, that the complainants at the suggestion of Skvirut went to Nyka as their lawyer in connection with this transaction before the contract was entered into. On the other hand Adankiewicz says he went to Nyka as his lawyer a week or two after the contract was entered into, which was when this mortgage was put on the property, Adankiewicz and his wife executing the notes to their own order and holding them ever since, and executing a trust deed to Nyka's wife to secure their payment; and Nyka admits that he represented Adankiewicz in connection with that matter and was paid a fee for it.

Another circumstance about this case which seems to us to be strange is that complainants received no opinion of title from Nyka until after the deeds had been passed. The warranty deed which was received by complainants from Adankiewicz and his wife, makes no reference to any mortgages - first or second. At the time the notes in the sum of \$6,000 were executed by Adankiewicz and his wife, they represented no debt of any kind and never have, under the evidence in this record. There was no consideration for these notes and there was no delivery of the notes. A mortgage is security for a debt and when no debt exists there cannot be a valid mortgage to secure it. 19 R.C.L. Sec. 68; Freutel v. Schnitz, 298 Ill. 330.

...and the usual way of making a mortgage ...
...but that he had sometimes done it that way.

...was satisfied by it and was satisfied by it

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The defendants contend that complainants are not in a position now to claim that they were defrauded, because it is shown that they did not repudiate the transaction upon the discovery of the alleged fraud. The contention is untenable. This is not a proceeding to rescind a contract. Rather, the complainants are asking that the contract be carried out according to its real terms and stripped of the provisions which they contend were put into it fraudulently, and in that connection they ask that an encumbrance put upon the property as a part of the alleged fraud be removed. There having been no consideration received by the complainants for the alleged fraudulent encumbrances, the complainants have received no benefits from the transaction involved in that encumbrance. Stebbins v. Perry County, 167 Ill. 567, 575.

It is further contended by the defendants that they are entitled to a vendor's lien for the \$6,000 in question, even though the encumbrance may be considered invalid. The cross-bill filed by the defendants was for a foreclosure of the trust deed. After the hearing of the case the defendants amended their cross-bill by inserting an alternative prayer for a vendor's lien. All the material allegations as to the trust deed securing the notes amounting to \$6,000 still remained in the cross-bill. The two theories were utterly inconsistent. One theory was based upon an express lien and the other was based upon an implied lien. In Baker v. Updike, 155 Ill. 54, there was involved a bill to foreclose a mortgage and the contention there made was that even if the complainant was not in a position to foreclose his mortgage, he was nevertheless entitled to a vendor's lien. The

The defendant contends that complainant has not
in a position now to claim that they were delivered, because
it is shown that they did not register the transmission
upon the delivery of the alleged funds. The defendant is
unable to show that it was a proceeding to transfer a mortgage.
At this, the defendant is not willing that the complaint be
dismissed but insists that the complaint be dismissed in the
provisions which they contend were not in the complaint.
and in that complaint they say that the mortgage was not
the property as a part of the alleged funds to transfer.
There being no evidence in the complaint to the contrary
the alleged mortgage was not transferred, the defendant
have received no benefit from the transaction involved in
this complaint. HARRIS V. HARRIS, 101 Cal. 211, 212.

It is further contended by the defendant that
they are entitled to a vendor's lien for the \$2,000 in ques-
tion, even though the defendant may be considered insolvent.
The cross-bill filed by the defendant was for a foreclosure
of the trust deed. After the hearing of the case the defend-
ant amended their cross-bill by inserting an alternative prayer
for a vendor's lien. All the material allegations in the
trust deed securing the notes amounting to \$2,000 still re-
main in the cross-bill. The two theories were mutually
exclusive. One theory was based upon an express lien
and the other was based upon an implied lien. In Harris v.
Harris, 101 Cal. 211, 212, there was involved a bill to foreclose
a mortgage and the contention there made was that even if
the complaint was not in a position to foreclose his note,
yet, he was nevertheless entitled to a vendor's lien. The

court held that he could not, on failing to prove his allegations as to the mortgage, abandon that theory and treat the case as though such allegations had never been made and seek to obtain a decree upon a theory which his bill, as drawn, expressly excluded. The situation in the case at bar is no different because the defendants here amended their bill, still leaving all the original allegations, based upon the theory of an express lien in the bill.

On the record in this case, presenting the conflicting evidence and involving the various circumstances to which we have referred, we are of the opinion that the trial court did not err in entering the decree appealed from, removing the \$6,000 encumbrance on the property taken by complainants as a cloud on their title, and dismissing the cross-bill for want of equity. The decree of the Superior Court is therefore affirmed.

DECREE AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

SECRET

and that the same was not a violation of the law.

There were and were to be a number of other things that were to be done, but they were not to be done until the time came when the people were ready to do them.

The word of God is no different between the two groups.

1. The first of these is the fact that the theory of the origin of life is still in its infancy. It is a subject which has attracted the attention of many of the most brilliant minds of the present day, and it is one which is likely to continue to do so for many years to come. The fact that it is still in its infancy is due to the fact that it is a subject which is still in its infancy. It is a subject which has attracted the attention of many of the most brilliant minds of the present day, and it is one which is likely to continue to do so for many years to come.

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

290 - 31422

PEOPLE OF THE STATE OF ILLINOIS,
ex rel LILLIAN G. KOLB,

Appellee.

v.

HALBERT H. PORTER, et al

Appellants.)

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Monday, June 13, 1927.

MR. JUSTICE THOMSON delivered the opinion
of the court.

The petitioner, Lillian G. Kolb, filed a petition in the Circuit Court of Cook County, asking that a writ of mandamus be issued commanding the defendants, who are officers of the City of Park Ridge, Illinois, to issue a permit to her for the erection of a garage upon property owned by her. The petitioner is the owner of Lots 51, 52, 53 and 54, fronting east on Prospect avenue. Lot 54 is a corner lot. The north side of that lot adjoins an east and west street called Cuttris Place. Petitioner had plans prepared for the building of a dwelling house and a garage on this property, consisting of all four lots. She procured a permit for the building of the dwelling house, and at the time she filed her petition involved in this case, it was nearing completion. On June 25, 1926, she presented to the defendant Porter, City Clerk of Park Ridge, drawings of a garage she proposed to erect and a plat showing the location of the garage with reference to the dwelling house and the lot lines, together with an application for a permit for the erection of the garage.

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200 - 11233

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF ILLINOIS,
IN AND FOR THE COUNTY OF COOK.
SALAMANT H. PORTER, et al,
Appellants,
vs.
The Board of Supervisors of Cook County,
Respondents.
Appealed from the judgment of the Circuit Court of Cook County, Illinois, entered on the 11th day of June, 1927.

MR. JUSTICE THOMAS delivered the opinion of the court.

The petitioner, William H. Kohn, filed a petition in the Circuit Court of Cook County, asking that a writ of mandamus be issued commanding the respondents, who are officers of the City of Park Ridge, Illinois, to issue a permit to her for the erection of a garage upon property owned by her. The petitioner is the owner of lots 51, 52, 53 and 54, fronting east on Prospect Avenue. Lot 54 is a corner lot. The north side of that lot adjoins an east and west street called Gentry Place. Petitioner had plans prepared for the building of a dwelling house and a garage on this property, consisting of all four lots. She procured a permit for the building of the dwelling house, and at the time she filed her petition involved in this case, it was nearly completed. On June 25, 1926, she presented to the defendant Porter, City Clerk of Park Ridge, drawings of a garage she proposed to erect and a plat showing the location of the garage with reference to the dwelling house and the lot lines, together with an application for a permit for the erection of the garage.

Petitioner alleged that she had complied with all the requirements of the ordinances relating to the application for her permit, but that on July 7, 1936, the City Clerk refused to issue the permit, on the ground that the City Council had so directed him, because in its opinion the garage should not be placed so that any part of it would be nearer than 25 feet to Outtris Place, whereas the plat submitted showed that the petitioner proposed building her garage so as to bring its north wall 6 feet $3\frac{1}{2}$ inches from the north side line of lot 54, which is the south line of Outtris Place.

The petitioner alleged that certain ordinances had been enacted by the City Council of Park Ridge, and were in full force and effect at the time she filed her application for this permit. Copies of these ordinances were attached to her petition.

Among the ordinances so pleaded by the petitioner was one passed July 5, 1932, providing, among other things, that no garage should be constructed nearer to any public street than 20 feet, measured from the lot line, and further, that the word "street" included "the side street running along any corner lots." Another ordinance pleaded was one passed February 3, 1935, amending the ordinance of July 5, 1932, so as to make it provide that no garage should be constructed nearer to any street "than the then existing and established building line in said public street."

The petitioner also pleaded the Zoning Ordinance of Park Ridge - only a part of which has been abstracted. Paragraph (d) of section IX of that ordinance provides that

Testimony alleged that the petitioners had not
received the ordinance relating to the building
line for their property, but that on July 5, 1908, the City
Council refused to issue the permit, on the ground that
the City Council had no jurisdiction in the
matter. The petitioners should not be placed in that position
of it would be better than to be placed in that position.
The petitioners also alleged that the ordinance
relating to the building line was not in force at the time
the petitioners were in possession of the property, and
that the petitioners were in possession of the property
at the time the ordinance was passed.

The petitioners alleged that certain ordinances
had been enacted by the City Council of this city, and
were in full force and effect at the time the petitioners
were in possession of the property. Copies of these ordinances
were attached to the petition.

Among the ordinances so alleged by the petitioners
was one passed July 5, 1908, providing, among other things,
that no person should be connected with any building
erected upon 22 feet, measured from the lot line, and further,
that the word "street" included "the side street running
along any corner lot". Another ordinance provided that no
person should be connected with any building erected upon 22 feet,
measured from the lot line, and further, that the word "street"
included "the side street running along any corner lot".

The petitioners also alleged that the Building Ordinance
of this city - only a part of which has been enacted,
section 12 of the ordinance provides that

no part of any building shall be closer to the street than the building line and that building lines for all lots located in residential districts shall "run parallel with and thirty five feet distant from the nearest street line" where no dwellings are located at the time the zoning ordinance was passed. Section XIII provides for a Zoning Board of Appeals. Section IX further provides that in blocks where buildings had been erected prior to the passage of the ordinance, the building line should be established as being identical with the line which had been theretofore established by user. It would seem from the allegations in the petition involved here that no building line had been established by user in the block in which the petitioner's property was located.

The defendants demurred to the petition for mandamus and the demurrer was overruled. Defendants elected to stand by their demurrer, whereupon, the court entered judgment in favor of the petitioner, ordering a writ of mandamus to issue as prayed. To reverse that judgment the defendants have prosecuted this appeal.

In support of their appeal the only argument advanced by counsel for the defendants is that the petitioners' own pleading shows that the Park Ridge Zoning Ordinance provides that "a Board of Appeals is hereby established", which is given the duties provided by statute, (Cahill's Ill. Statutes, ch. 24, par. 523) and it is contended that if petitioner felt aggrieved by reason of the refusal of her petition for permit, her remedy was to appeal to the Park Ridge Zoning Board of Appeals, and if their action was likewise unfavorable, petitioner had the right, under the law, to bring

no part of any building shall be closer to the street than the building line and that building lines for all lots located in residential districts shall "run parallel with and thirty five feet distant from the nearest street line" where no buildings are located at the time the zoning ordinance was passed. Section XIII provides for a zoning board of appeals. Section IX forbids provides that in blocks where buildings had been erected prior to the passage of the ordinance, the building line should be established as being identical with the line which had been theretofore established by deed. It furthermore from the allegations in the petition involves here that no building line had been established by deed in the block in which the petitioner's property was located.

The defendants demurred to the petition for various reasons and the court was divided. The court entered judgment in favor of the petitioner, ordering a writ of mandamus to issue in proper case to reverse that judgment the defendants have prosecuted this appeal.

In support of their appeal the only argument advanced by counsel for the defendants is that the petitioners own pleading shows that the said zoning ordinance provides that a board of appeals is hereby established, which is given the duties provided by statute. (Ordinance No. 111, Statutes, ch. 24, sec. 583) and it is contended that if petitioner felt aggrieved by reason of the refusal of her petition for permit, her remedy was to appeal to the said Board of Appeals, and if their action was likewise unfavorable, petitioner had the right, under the law, to bring

the matter into a court of record by certiorari. It is further argued that the permit was properly refused "as the building line is thirty five feet set forth in the Zoning Ordinance and any building set only six and one-half feet from the lot line is a violation thereof." Thus, the contention is made by defendants that the application of petitioner for a permit to build her garage was properly refused, because its location on her property showed a violation of the terms of section IX (d) of the Zoning Ordinance. In our opinion that section has no application to the question of the distance between the proposed location of petitioner's garage and the north lot line of her property along Cuttris Place. In construing the provisions of Section IX, (d) we are bound to give them a reasonable application. As applied to Lot 54, fronting on Prospect avenue and having one side bordering on Cuttris Place, that section provides for a building line running north and south parallel with the street line of Prospect avenue and thirty-five feet east of that street line. This ordinance, of course, may not be so applied as to give that lot another building line parallel with the street line of Cuttris Place, and thirty-five feet back from that street line, for the lot itself is considerably less than 35 feet wide. Such an application of the ordinance would make it impossible to improve Lot 54 at all.

No argument is made by the defendants to the effect that the plat submitted by the petitioner in connection with her petition, showed a violation of the provisions of the ordinance of July 5, 1922, as amended February 3, 1925. The only argument is that the permit was properly refused, as the plat showed a violation of the building line provisions

the matter into a court of record by certiorari. It is further argued that the permit was properly refused "as the building line is thirty five feet from the lot line in the zoning ordinance and any building set only six and one-half feet from the lot line is a violation thereof." Thus, the contention is made by respondents that the application of petitioner for a permit to build her garage was properly refused, because its location on her property showed a violation of the terms of section 12 (4) of the zoning ordinance. In our opinion that section has no application to the question of the distance between the proposed location of petitioner's garage and the north lot line of her property along Gutter's Place. In construing the provisions of section 12, (4) we are bound to give them a reasonable application. As applied to lot 24, fronting on Prospect Avenue and having one side bordering on Gutter's Place, that section provides for a building line running north and south parallel with the street line of Prospect Avenue and thirty-five feet east of that street line. This ordinance, of course, may not be so applied as to give that lot another building line parallel with the street line of Gutter's Place, and thirty-five feet back from that street line, for the lot itself is considerably less than 35 feet wide. Such an application of the ordinance would make it impossible to locate lot 24 at all.

An argument is made by the respondents to the effect that the plan submitted by the petitioner in connection with her petition showed a violation of the provisions of the ordinance of May 3, 1922, as amended February 2, 1923. The only argument is that the permit was properly refused, as the plan showed a violation of the building line provisions

of the Zoning Ordinance, as set forth in Section IX (d). In our opinion, the plat failed to show a violation of those provisions, for the reasons stated. Moreover, the petition shows on its face that the application for a permit had been refused, not on the ground that it violated any provision of the Zoning Ordinance, but "because the council believed that no portion of said garage should be nearer to the south line of Outtris Place than 25 feet." Thus it appears that the reason assigned for the refusal of the permit, did not involve the zoning ordinance.

Defendants also contend that the petition fails to show that any demand was ever served on the Mayor or City Council. In our opinion, this point is also without merit. The ordinances pleaded showed that they provided that one desiring to erect any building shall obtain a permit from the City Council for that purpose, and that one desiring such a permit shall make a written application therefor, to the Mayor, which application shall be signed by the person desiring the permit and shall give a description of the character and size of the building sought to be constructed, together with its location; and further, that "whenever any such application shall be made it shall be filed with the City Clerk." The petition filed in this case shows that it contained all the information thus called for; was properly signed by the petitioner, and was by her agent properly filed as the ordinance requires.

For the reasons we have given, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

of the zoning ordinance, as set forth in Section II (b). In our opinion, the plan failed to show a violation of these provisions, for the reasons stated. Moreover, the petition

shows on its face that the application for a permit had been refused, not on the ground that it violated any provision of the zoning ordinance, but because the council believed that no portion of said garage should be set back to the south line of Center Place than 25 feet. Thus it appears that the reason assigned for the refusal of the permit, did not involve the zoning ordinance.

Petitioners also contend that the petition fails

to show that any interest was ever served on the Mayor or City Council. In our opinion, this point is also without merit. The ordinance provided that they provided that one desiring to erect any building shall obtain a permit from the City Council for that purpose, and that one desiring such a permit shall make a written application therefor to the Mayor, which application shall be signed by the person desiring the permit and shall give a description of the character and site of the building sought to be constructed, together with its location; and further, that whenever any such application shall be made it shall be filed with the City Clerk. The petition filed in this case shows that it contained all the information thus required; was properly signed by the petitioner, and was by her agent properly filed

as the ordinance requires.

For the reasons we have given, the judgment of the

District Court is affirmed.

JOSEPH W. ALLEN.

TAYLOR, J. J. AND O'CONNOR, J. J. JUDGES.

300 - 31432

DR. A. DE LUCA for use of
ADAM PREHLER,

Appellee,

v.

FORT OARBORN CASUALTY UNDER-
WRITERS, a corp.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Monday, June 13, 1927.

MR. JUSTICE THOMSON delivered the opinion
of the court.

This was an action of the fourth class in
the Municipal Court of Chicago. It was originally one
brought by Prehler against De Luca to recover damages
caused to the plaintiff's automobile by a collision.
The plaintiff recovered a judgment of \$222.60 by de-
fault. After that judgment had been recovered execu-
tion was issued, a demand made, and the execution re-
turned "No property found." A garnishee summons was
then procured by the plaintiff and the Fort Dearborn
Casualty Underwriters was brought in as garnishee.
After the garnishee was brought in, there was a hearing
and judgment was entered against the garnishee for the
amount which the plaintiff had recovered against De Luca.
To reverse that judgment the garnishee has perfected
this appeal.

In support of the appeal the garnishee contends
that the judgment against it cannot stand because the
plaintiff failed to make proof of the fact that he had
recovered a judgment against the original defendant

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Opinion filed Monday, June 18, 1937.

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1994

and 9/10/1944 at 11.00 AM. The first of these was a

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model for a 100% efficient refrigerator at 0°C.

... of the ...

SECRET

[illegible]

(continued)

1. The first group of people who are not in the labor force are those who are not in the labor force for any reason. This group includes people who are not in the labor force because they are not in the labor force for any reason. This group includes people who are not in the labor force because they are not in the labor force for any reason.

...and of the

THE UNIVERSITY OF CHICAGO PRESS

Large area

signature and address, but I cannot add to the address of _____

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See on field post with 10 strong men of hotel Thienhai

THE NATIONAL ARCHIVES COLLEGE PARK, MARYLAND

De Luca and that execution had been issued and returned "No property found." This garnishment proceeding was not a new case but the supplementary proceedings in garnishment were had as a continuation of the original case by Prehler against De Luca. Where it appears that garnishment proceedings are a part of the same cause as that in which the original judgment was entered, the trial court properly takes judicial notice of all that has transpired in that case and it is not necessary to have the judgment and execution and return thereon, offered in evidence, and on appeal included in the bill of exceptions. It is sufficient in such a situation if they are included in the common law record. Dandridge, for use of Appell v. Northern Trust Company, 218 Ill. App. 138; Schmitt v. Ashbrook Electric Co., 218 Ill. 650; Senelick for use, v. Mann, 239 Ill. App. 568; Hankel v. East & West Pub. Co., 239 Ill. App. 336; Foncher, et al v. Mohawk Auto Equipment Co., Ill. App. Ct., First District, opinion filed May 2, 1927.

In the course of the trial of this case the plaintiff had occasion to make proof as to the policy which had been issued by the defendant to DeLuca. Counsel for the plaintiff had served a notice on the defendant to produce the policy or a copy of it. When the defendant was asked to produce the policy, on the trial, counsel stated that they did not have it but that the policy holder had it. Counsel for the plaintiff then produced a blank form of policy, which was marked "Specimen," and, over objection of the defendant, it was received in evidence. This ruling was not correct. The plaintiff, in our opinion,

should not have been permitted to introduce secondary evidence without showing that he had made a proper effort to produce the policy, which presumably was in the hands of the one to whom it had been issued - Deluca. This specimen policy was incompetent even as secondary evidence, for no proper showing was made that it was a copy of the policy held by Deluca. If the defendant had stood by its motion for a finding, made at the close of the plaintiff's case, this appeal might have resulted differently, but the defendant did not do so. It proceeded to submit proof, in support of its defense, and in that connection one Wicoff, chief claim adjuster for the defendant, in the course of his testimony, admitted that the defendant had a policy covering Deluca, which was in force at the time the latter collided with the plaintiff's automobile and damaged it. The evidence submitted by the defendant further shows that when the plaintiff made a demand because of this damage to his car and because of the fact that De Luca was covered by insurance issued by the defendant, the only reason given by the latter for refusing to consider the claim was "that the policy held by Mr. De Luca specifically provides for his turning over any notices of suit or summons, immediately upon receipt thereof, and in the instant case the assured did not bring in the summons or bring same to our attention until after return date of same and judgment had been entered. Under these circumstances there is no liability of the Fort Dearborn Casualty Company under their policy, for the reason that the assured failed to comply with the provisions of his policy, as above stated. We are therefore not interested in making any settlement of the judgment against him ***."

and feelings throughout, and to emphasize the nature of these

was obliged to deny coverage under the policy." Wickoff said they never had any notice of this case other than by means of the copy of the summons sent to them by De Luca.

Prehler testified that he went to the office of the defendant company on La Salle Street, in Chicago, after his automobile had been damaged, and had been repaired, and asked the information clerk for the adjuster, and some one came out, and the witness told him about his claim, whereupon, the man who talked with him looked over a file and then told him he could do nothing about the matter "until you start suit." He then testified that he started suit on his claim, and a day or so afterwards his lawyer gave him some papers in an envelope, the contents of which the witness did not know; that he took this envelope down to the office of the defendant company and again asked for an adjuster and "a man came up, a thin kind of man, and I gave him this envelope you gave me and he went over to the files and looked in it and he said, 'I can't do nothing until you get judgment.'" Prehler then testified that he took the envelope back to his lawyer. The lawyer testified that he started suit after Prehler told him the insurance company wouldn't pay him until suit had been started, and a day or two after the suit was started, "I took my office copies of the summons and process which I filed in this court, being a carbon copy of the original which had the clerk's number on it, and made a copy of them for the insurance company, and put it in an envelope and told Mr. Prehler to take this down to the insurance company and let them have one copy and bring me back one copy." He testified that an hour or two later Prehler came back to his office, saying he had been down to the insurance company's

was obliged to deny coverage under the policy. Witness
said they never had any notice of this case until then
by means of the copy of the summons sent to them by the
Treasurer testified that he went to the office of the
insurance company on La Salle Street, in Chicago, after his
automobile had been damaged, and had been repaired, and
asked the information clerk for the adjuster, and when she came
out, and the witness told him about his claim, whereupon
the man who talked with him looked over a file and then told
him he could do nothing about the matter "until you state
better." He then testified that he stopped with his claim,
and a day or so afterwards his lawyer gave him some papers
in an envelope, the contents of which the witness did not
know; that he took this envelope down to the office of the
insurance company and again asked for an adjuster and "a man
came up, a thin kind of man, and I gave him this envelope
and gave me and he went over to the file and looked in it
and he said, 'I can't do nothing until you get judgment.'"
Treasurer then testified that he took the envelope back to
his lawyer. The lawyer testified that he started with a letter
Treasurer told him the insurance company wouldn't pay his bill
until had been stated, and a day or two after the bill was
stated, "I took up/alias copies of the summons and process
which I filed in this court, being a carbon copy of the
original which had the clerk's number on it, and made a copy
of them for the insurance company, and put it in an envelope
and told Mr. Treasurer to take them down to the insurance
company and let them have one copy and bring me back one copy."
He testified that on June or two later Treasurer came back to
his office, saying he had been down to the insurance company's

was obliged to deny coverage under the policy." Wickoff said they never had any notice of this case other than by means of the copy of the summons sent to them by De Luca.

Prehler testified that he went to the office of the defendant company on La Salle Street, in Chicago, after his automobile had been damaged, and had been repaired, and asked the information clerk for the adjuster, and some one came out, and the witness told him about his claim, whereupon, the man who talked with him looked over a file and then told him he could do nothing about the matter "until you start suit." He then testified that he started suit on his claim, and a day or so afterwards his lawyer gave him some papers in an envelope, the contents of which the witness did not know; that he took this envelope down to the office of the defendant company and again asked for an adjuster and "a man came up, a thin kind of man, and I gave him this envelope you gave me and he went over to the files and looked in it and he said, 'I can't do nothing until you get judgment.'" Prehler then testified that he took the envelope back to his lawyer. The lawyer testified that he started suit after Prehler told him the insurance company wouldn't pay him until suit had been started, and a day or two after the suit was started, "I took my office copies of the summons and process which I filed in this court, being a carbon copy of the original which had the clerk's number on it, and made a copy of them for the insurance company, and put it in an envelope and told Mr. Prehler to take this down to the insurance company and let them have one copy and bring me back one copy." He testified that an hour or two later Prehler came back to his office, saying he had been down to the insurance company's

was obliged to deny coverage about the matter. However,
said they never had any notice of this case until then.
By means of the copy of the summons sent to them by the law,
Frieder testified that he went to the office of the
attorney company on 12 July 1962, in Chicago, after his
attestations had been changed, and had been received, and
received the information about the subject, and some time later,
and the witness told him about the state, Chicago,
the way was talked with him because there was a bill and then said
him to wait to hearing about the matter "until the matter
ends." He then testified that he started work on his office
and a copy of an affidavit his lawyer gave him some papers
in an envelope, the contents of which the witness did not
know; that he took this envelope down to the office of the
defendant company and again asked for an affidavit and "a copy
some up, a thin kind of man, and I gave him this envelope
you gave me and he went over to the files and looked in it
and he said, "I don't do nothing until you get judgment."
Frieder then testified that he took the envelope back to
his lawyer. The lawyer testified that he turned over after
Frieder told him the insurance company wouldn't pay the bill
and had been advised, and he said he was after the bill was
started, "I need written notice of the insurance and perhaps
which I filed in this court, being a carbon copy of the
original which had the court's number on it, and made a copy
of them for the insurance company, and put it in an envelope
and told Mr. Frieder to take this down to the insurance
company and let them have one copy and bring me back one copy."
He testified that on June 12, 1962, Frieder came back to
his office, saying he had been down to the insurance company's

office, and he returned the envelope "in which there was then one copy of the summons and one of the praecipe."

This court is not in a position to say that the trial court was not warranted in believing the testimony submitted in behalf of the plaintiff, to the effect that copies of the summons and praecipe in this case had been placed in the hands of someone in the office of the defendant, who answered to the description of an adjuster. If that was the case, the defendant had all the benefit of the notice, to insure the receipt of which the condition of the policy now relied upon, was inserted. If, upon receiving these papers from the plaintiff, the adjuster in its office merely remarked that the defendant could do nothing about the claim until the plaintiff had procured a judgment, (and again we are not in a position to say that the trial court was not justified in believing that this is what occurred), in our opinion, the defendant must be considered as having waived this condition, so far as the claim of the plaintiff is concerned. Meyer v. Iowa Mutual Life Ins. Co., 240 Ill. App. 431.

For the reasons we have given, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

office, and he intended the evidence in which there was
from one copy of the summons and one of the answers.

This court is not in a position to say that
the trial court was not warranted in believing the facts
very much as in behalf of the plaintiff, on the other
hand, it is the court's duty to believe in the facts as
they appear in the hands of evidence in the office of

the plaintiff, and answered to the defendant's
objection. It then was the case, the defendant had all
the benefit of the motion, he made the receipt of which
the plaintiff of the policy was voided, was inserted.

It was receiving those papers from the plaintiff, the
defendant is the office merely received the defendant's

could be nothing about the claim until the plaintiff had
presented a judgment, and again we are not in a position to

say that the trial court was not justified in believing
that this is what occurred, in our opinion, the defendant
and must be considered as having waived this condition, as
far as the claim of the plaintiff is concerned. Page 7.

THE TRIAL COURT WAS NOT JUSTIFIED IN BELIEVING
that the evidence we have given, the judgment of
the plaintiff was in all.

DEFENDANT'S ANSWER.

1. The defendant answers that the plaintiff's
claim is based on the fact that the defendant

has not paid the sum of \$100.00 to the plaintiff
and that the plaintiff is entitled to recover the same
from the defendant. The defendant denies that the
plaintiff is entitled to recover the same from the
defendant. The defendant further denies that the
plaintiff is entitled to recover the same from the
defendant.

313 - 31445

N. P. SEVERIN AND A. H. SEVERIN,
co-partners doing business as
N. P. SEVERIN COMPANY,

Appellees,

v.

THE FLANAGAN & BIRKENWEG COMPANY,
a corporation,

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Monday, June 13, 1927.

MR. JUSTICE THOMSON delivered the opinion
of the court.

By this appeal the defendant seeks to reverse a judgment for \$265.00, recovered against it by the plaintiffs in the Municipal Court of Chicago. The plaintiffs filed an amended statement of claim in which they alleged that the defendant had entered into a written contract with them to do certain glazing work on a residence on which the plaintiffs had a general building contract; that under said contract it was the defendant's duty to furnish and use a good grade and quality of putty, but that owing to the fact that a poor and inferior quality of putty was used by the defendant in doing this work, it became necessary for the plaintiff to have the putty which the defendant had used, removed and to have the work re-puttied; inasmuch as the defendant refused to do the work over again. It was alleged that the plaintiffs had paid the defendant the full contract price for the work agreed upon and that they had been obliged to pay out \$265.00 in having the work done over. The defendant filed its affidavit of merits, and the issues

215 - 7140

M. F. BROWN and A. F. BROWN,
CO-DEFENDERS herein
vs.
M. F. BROWN and A. F. BROWN,
PLAINTIFFS

Verdict

7.

THE PLAINTIFFS A BROWN BROTHERS
A CORPORATION

Verdict

Opinion filed Monday, June 15, 1937.

RE. BROWN BROTHERS v. BROWN BROTHERS

of the court.

By this court the defendant made no recovery
a judgment for \$250.00, recovered against it by the plaintiff
in the Circuit Court of Chicago. The plaintiff
filed an amended statement of claim in which they alleged
that the defendant had entered into a contract with them
that to be certain they had a contract in writing.
The plaintiff had a contract in writing; that was
said contract it was the defendant's duty to furnish and
was a good grade and quality of work, but was not
the fact that a poor and inferior quality of work was
used by the defendant in doing this work, it became necessary
for the plaintiff to have the work re-done; however
had need, wanted and to have the work re-done; however
as the defendant refused to do the work over again, it was
alleged that the plaintiff had paid the defendant the full
contract price for the work agreed upon and that they had
been obliged to pay out \$250.00 in having the work done over.
The defendant filed its affidavits of service, and the issues

thus formed were tried before the court without a jury, after which the court found the issues against the defendant and assessed the plaintiff's damages at the amount sued for, and entered judgment accordingly. To reverse that judgment, the defendant has perfected this appeal.

In our opinion, the statement of claim set forth a good cause of action, contrary to the contention of the defendant. But in no event would the judgment be disturbed on this point if the evidence showed that plaintiff has a cause of action. Edgerton v. G.R.I. & P. R.R. Co., 240 Ill. 311. We are also of the opinion that the finding and judgment of the court is not against the manifest weight of the evidence. The plaintiffs submitted evidence showing that the specifications for the work in question provided that all materials used were to be the best of their respective kind; that the work called for by the contract purported to have been done, and the price called for by the contract, was paid by the plaintiffs to the defendant; that some time after the work was done, complaint was made with reference to the putty whereupon, the plaintiffs investigated the complaint and found that the putty which had been used by defendant, was of a poor quality; that it was still soft several months after it had been applied and was not adhering to the wood in the sash, and in several places it had fallen off; that in most cases it was still soft and in others it was crumbling. The testimony was further to the effect that plaintiffs called up someone connected with the defendant, who went out to the job, and after examining it said that "he didn't know what the trouble was, there was something radically wrong," and "he would have to take it up

III. To give effect to the wishes of the parties and to
 secure of action. Admission V. Exclusion of the Public
 to the point of the evidence should that liability has a
 defendant. But in no event would the judgment be reversed
 a full review of the evidence, contrary to the suggestion of the
 in our opinion, the evidence of claim and fact

[illegible]

with Mr. Flanagan or Mr. Biedenweg." Shortly thereafter, the testimony shows, one of the plaintiffs had a talk with Flanagan who said he had communicated with the concern that had furnished the putty and that he had been out to the job and examined it; and he said that "the failure of the putty was due to the fact the sash wasn't primed prior to the application of the putty." One of the plaintiffs testified that he submitted a sample of the putty to a testing laboratory in Pittsburg and a certificate of their analysis was submitted, but on objection, the court refused to admit it in evidence. It was further shown that the defendants were requested to do the work over, but they would not do so and consequently the plaintiffs had the work done over by the Herman Olson Decorating Company, the latter removing all the putty and replacing it, at a cost of \$265.00 which was a reasonable charge for the service rendered, and was the least of the bids submitted for doing the work over. One of the plaintiffs testified that all wood sash was primed before the glazing work was done and that the priming was done properly. On cross-examination, the plaintiffs' witness, whose testimony has been referred to, testified that the first coat of paint put on after the putty was in place, was applied a week or so after the glazing work had been finished; that it was done in November or December; and that they sometimes waited as long as ten days before painting new putty work if the weather was warm. It was further stated that when the paint was applied, the putty had "formed". This witness testified that the trouble with the putty which the defendant had

with Mr. Thompson or Mr. Nicholson. The testimony shows that the defendant who said he had communicated with the witness that had furnished the party and that he had been out to the job and examined it; and he said that "the failure of the party was due to the fact the same wasn't placed prior to the application of the party." One of the plaintiffs testified that he submitted a sample of the party to a testing laboratory in Chicago and a certificate of analysis was received, but on objection, the court refused to admit it in evidence. It was further shown that the defendants were represented to do the work over, but they would not do so and consequently the plaintiffs had the work done over by the same firm contracting company. The latter testified all the party and material it, at a cost of \$100.00 plus a reasonable charge for the service rendered, and was the least of the side submitted for doing the work over. One of the plaintiffs testified that all work each was placed before the painting work was done and that the painting was done properly. On cross-examination, the plaintiffs' witness, whose testimony has been referred to, testified that the first coat of paint put on after the party was in place, was applied a week or so after the painting work had been finished; that it was done in November or December and that they sometimes waited as long as ten days before painting the party over. It was further stated that when the paint was applied, the party had "faded". This witness testified that the trouble with the party which the defendant had

used was that "it wasn't linseed oil putty."

For the defendant, Flanagan testified that the putty was all right and that the concern which had furnished it, upon examining the putty and the job on which it was placed, gave it as their opinion that the failure of the putty was due to the fact that the sash was not sufficiently primed before the glazing work was done, which allowed the oil of the putty to penetrate into the wood sash, thus causing the putty to draw away from the sash and crack and crumble because of the loss of oil in the putty; and also that a heavy coat of paint had been applied to the putty too soon after the glazing work was done, which had the effect of sealing the putty and preventing it from drying properly. It will thus be seen that a conflict of evidence is presented and from the testimony of the witnesses for the respective parties, the trial court concluded that the witnesses, testifying in behalf of the plaintiff, were correct in saying that the sash had been primed properly and that after the putty was placed, a sufficient time for drying had elapsed before the work of painting was done, and that the putty had failed because of its poor quality, and we are unable to say that the finding is against the manifest weight of the evidence.

We find no error in the record, and, therefore, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

which was that "it wasn't finished all right."

For the defendant, witnesses testified that the entry was all right and that the concrete which had been poured into it, upon examining the entry and the job on which it was done, was all right. They also testified that the failure of the entry was due to the fact that the concrete was not sufficiently poured before the flashing was done, which allowed the oil of the entry to penetrate into the wood work, thus causing the entry to draw away from the wood and create a terrible vacuum at the joint of oil in the entry; and also that a heavy coat of paint had been applied to the entry too soon after the flashing was done, which had the effect of sealing the entry and preventing it from drying properly. It will thus be seen that a majority of witnesses is convinced that from the testimony of the witnesses for the defendant, the trial court concluded that the witnesses testifying in behalf of the plaintiff, were correct in saying that the work had been done properly and that after the entry was placed, a sufficient time for drying had elapsed before the work of painting was done, and that the entry had failed because of its poor quality, and so are unable to say that the flashing is against the manifest weight of the evidence.

We find no error in the record, and therefore the judgment of the United States is affirmed.

THOMAS J. BROWN.

2451.A. 621 #2

322 - 31454

BARRON G. COLLIER, INC.,
Appellee,

v.

McNICHOLS & KIMMEL, INC.,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Monday, June 13, 1927.

MR. JUSTICE THOMSON delivered the opinion of
the court.

The plaintiff filed its statement of claim in an action of the first class in the Municipal Court of Chicago, alleging that on June 25, 1923, the defendant corporation had entered into a contract with the plaintiff, copy of which was attached to the statement of claim. This contract provided that the plaintiff, which was an advertising company, was to do certain advertising of the defendant's business in street cars of certain specified lines, in the City of Chicago, for a term of five years, beginning September 1, 1923, in consideration for which the defendant agreed to pay the plaintiff \$209.25 a month up to December, 1927, and \$227.50 a month thereafter up to the completion of the contract period. By the terms of the contract the defendant also agreed to furnish certain material to the plaintiff, at the defendant's own expense. The contract in question cancelled two prior contracts between the parties, both dated October 16, 1922. By its statement of claim the plaintiff further alleged that it

3451A. 621

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100 - 1000

UNITED STATES COURT
OF DISTRICT COLUMBIA

WILLIAM A. TAYLOR, JR.,
Plaintiff,
vs.
UNITED STATES DEPARTMENT OF JUSTICE,
Defendant.

Opinion filed Monday, June 15, 1937.

The plaintiff filed the statement of claim in an action at law filed in the District Court of Chicago, Illinois, on June 15, 1937, the defendant corporation had entered into a contract with the plaintiff, copy of which was attached to the statement of claim. This contract provided that the plaintiff, which was an advertising agency, was to do certain advertising of the defendant's business in Great City of Chicago, for a term of five years, beginning January 1, 1937, in consideration for which the defendant agreed to pay the plaintiff \$200.00 a month up to December, 1937, and \$250.00 a month thereafter up to the completion of the contract period. By the terms of the contract the defendant also agreed to furnish certain material to the plaintiff, at the defendant's own expense. The contract in question cancelled two prior contracts between the parties, both dated October 15, 1935. By the statement of claim the plaintiff further alleged that it

had performed all its obligations under the contract and had furnished the defendant all the advertising called for by the contract, and that there was then due from the defendant to the plaintiff for such advertising services, for the period beginning September 31, 1923, and ending January 31, 1925, the sum of \$3,679.43, less nine payments which the defendant had made, aggregating \$1,968.11, leaving a balance due amounting to \$1,711.32. There was a statement of account attached to the statement of claim, giving all the items of debit and credit, and showing the balance due as alleged. The contract as set forth in the statement of claim purported to be signed in defendant's behalf by its president, one Kimmel. The defendant duly appeared and filed its affidavit of merits, in which it admitted "that on June 25, 1923, it entered into a contract with plaintiff, marked Exhibit A, in plaintiff's statement of claim." The defendant then denied that the plaintiff had performed its obligations and the requirements of the contract, or furnished all the advertising covered by the contract, or that there was due from the defendant to the plaintiff for such services, rendered under the contract, the sum sued for. The defendant then admitted, in its statement of claim that it had made all the payments which were credited to it in the statement of account attached to the plaintiff's statement of claim, except that no mention is made in the affidavit of merits, of the last payment credited to the defendant in that statement of account. The affidavit of merits then contained a paragraph alleging that "at the time the contract was entered into between the plaintiff and the

had performed all the obligations under the contract and had furnished the defendant all the advertising which was due by the contract, and that there was then due from the defendant to the plaintiff for such advertising services, for the period beginning September 21, 1925, and ending January 21, 1926, the sum of \$2,875.45, less nine payments which the defendant had made, aggregating \$1,902.11, leaving a balance due amounting to \$1,711.35. There was a statement of account attached to the statement of claim, giving all the items of debit and credit, and showing the balance due as alleged. The contract as set forth in the statement of claim purported to be signed in defendant's behalf by its president, one Linn. The defendant duly appeared and filed its affidavit of denial, in which it admitted that on June 22, 1925, it entered into a contract with plaintiff, under which it, as plaintiff's agent, was to perform its obligations and the requirements of the contract, or furnished all the advertising covered by the contract, or that there was due from the defendant to the plaintiff for such services, rendered under the contract, the sum and for. The defendant then admitted, in its statement of claim that it had made all the payments which were specified to it in the statement of account attached to the plaintiff's statement of claim, except that no mention is made in its affidavit of denial, or the last payment credited to the defendant in that statement of account. The affidavit of denial then contained a paragraph alleging that "at the time the contract was entered into between the plaintiff and the

defendant² the defendant's president Kimmel advised its board of directors that the contract was for one year, and that pursuant thereto the defendant authorized Kimmel to contract for advertising for that period of time, but that Kimmel had no authority to contract for a period longer than that. It was further alleged that the secretary of the corporation had never attested the contract nor affixed the corporate seal thereto, and that the defendant had at no time agreed to pay for any advertising for which this contract ran, and that the contract was entered into without any express or written authority to Kimmel, as president of the company, and that it was the duty of the plaintiff to ascertain the extent of Kimmel's authority when the contract was entered into, and inasmuch as it had failed to do this, the corporation was not liable.

On motion of the plaintiff the court struck the foregoing amended affidavit of merits from the files. The defendant elected to stand by its amended affidavit of merits, whereupon the court entered an order defaulting the defendant; assessed the plaintiff's damages at the amount sued for and entered judgment for that amount in plaintiff's favor. To reverse that judgment the defendant has perfected this appeal.

The only argument advanced by the defendant in support of its appeal, has to do with the alleged lack of authority on the part of Kimmel to execute the contract.

It is contended that Kimmel could not bind the defendant by acts which were not within the apparent scope of his

...the defendant's position ...
...of directors ...
...that plaintiff ...
...to contract for advertising ...
...that plaintiff had no authority ...
...larger than that. It was further alleged ...
...any of the corporation had never ...
...and that the ...
...defendant had at no time agreed to pay ...
...for which this contract was, and that the contract was ...
...entered into without any express or ...
...to plaintiff, as president of the company, and that it was ...
...the duty of the plaintiff to ascertain the extent of plaintiff's ...
...authority when the contract was entered into, and inasmuch ...
...as it had failed to do this, the corporation was not liable.

On motion of the plaintiff the court struck ...
...the remaining amended affidavits of parties from the files. ...
...The defendant offered to stand by its amended affidavit ...
...of parties, whereupon the court entered an order ...
...the defendant; assessed the plaintiff's damages at the ...
...amount owed for and entered judgment for that amount in ...
...plaintiff's favor. To reverse that judgment the defend- ...
...and has presented this appeal.

The only argument advanced by the defendant in ...
...support of its appeal, has to do with the alleged lack of ...
...authority on the part of plaintiff to execute the contract. ...
...It is contended that plaintiff could not bind the defendant ...
...by acts which were not within the apparent scope of his

authority; that the contract, on its face, was of an extraordinary character and not within the apparent scope of Kimmel's authority, as president of the company, and so should have put the plaintiff on its guard; that even though it be assumed that the subject-matter of the contract was not foreign to the general power of the president of a corporation, the question of whether it was actually within his power, so as to make his act binding upon the corporation, was a presumption which was rebuttable, and that the denial of the authority of Kimmel, set forth in the affidavit of merits, properly raised an issue of fact which should have been submitted to a jury and not treated as a question of law. In our opinion, the affidavit of merits may not be supported by that argument. The language to be found in the affidavit will be construed most strongly against the defendant, whose pleading it is. The first sentence in the affidavit states that the "defendant admits that on June 25, 1923, it entered into a contract with plaintiff, marked Exhibit A in plaintiff's statement of claim." Nothing that might follow in the affidavit of merits after that, could be construed as nullifying such an express admission. Moreover, the affidavit of merits further expressly admits in detail the making of eight monthly payments during the period of this contract, beginning in September 1923 and extending to April 1924. There is no allegation in the affidavit to the effect that the defendant did not know of this contract during that time. In making these payments it is apparent that even though it be assumed that Kimmel had no authority to execute the contract, the company thereafter ratified his action in

authority; that the contract, on its face, was of an
extraordinary character and not within the apparent scope
of Kimmel's authority, as president of the company, and
it should have put the plaintiff on his guard; that even
though it be assumed that the subject-matter of the
contract was not foreign to the general power of the pre-
sident of a corporation, the question of whether it was
actually within his power, so as to make him not binding
upon the corporation, was a presumption which was rebuttable,
and that the denial of the authority of Kimmel, not forth-
coming in the affidavit of denial, properly raised an issue of
fact which should have been submitted to a jury and not
treated as a question of law. In our opinion, the affidavit
of denial may not be supported by that argument. The
language to be found in the affidavit will be considered
most strongly against the defendant, where meaning it is.
The first sentence in the affidavit states that the defend-
ant admits that on June 25, 1935, it entered into a con-
tract with plaintiff, without Exhibit A in plaintiff's state-
ment of denial. Nothing that is alleged in the affidavit
of denial other than that could be considered as nullifying such
an express admission. Moreover, the affidavit of denial
further expressly admits in detail the making of said
monthly payments during the period of this contract, beginning
in September 1935 and extending to April 1936. There is
no allegation in the affidavit as to the effect that the defend-
ant did not know of this contract during that time. In
making these payments it is apparent that even though it
be assumed that Kimmel had no authority to execute the
contract, the company thereafter ratified his action in

making it, by thus recognizing it and making these monthly payments which were alleged in the affidavit of claim and admitted in the affidavit of merits. The affidavit of claim alleges that these payments were all made on this contract. That allegation is nowhere denied in the affidavit of merits.

The judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

The subject of the complaint is a citizen of the United States, who is a resident of the State of New York, and who is a member of the State Bar of New York. The subject of the complaint is a citizen of the United States, who is a resident of the State of New York, and who is a member of the State Bar of New York.

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JAMES M. LARSON and PAUL P. KELLY,
doing business as the Arryon
Electrical Co.,

Appellees,

APPEAL FROM

v.

MUNICIPAL COURT
OF CHICAGO.

BURGE ICE MACHINE CO.,

Appellant.

Opinion filed Monday, June 13, 1927.

MR. JUSTICE THOMSON delivered the opinion of
the court.

By this appeal the defendant seeks to reverse
a judgment for \$72.00, recovered against it in the
Municipal Court of Chicago by the plaintiffs. The action
by the latter was one of the fourth class, in which the
plaintiffs sought to recover for certain materials furnished
and work done in installing some electrical wiring, which
work plaintiffs alleged had been done at the defendant's
request. The balance sued for was the amount for which
the plaintiffs recovered judgment.

In support of the appeal defendant contends
that the judgment is against the manifest weight of the
evidence. The hearing was before the court without
a jury. It appears from the evidence in the record
that the Burge Ice Machine Co. installed an ice plant
in the premises of the Chicago Ice Cream Company. Some
time after that work was done, the Ice Cream Company com-
plained that the plant was not giving satisfaction, and

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1. The first of these is the fact that the
2. second of these is the fact that the
3. third of these is the fact that the

1991-1992

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1. The first step is to identify the problem or question that needs to be answered.

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Opinion filed Monday, June 18, 1957.

7. Do not use the word "because" in your answer.

• 2000-2001

By this appeal the defendant seeks to reverse judgment for \$75.00, recovered against it in the Municipal Court of Chicago by the plaintiff. The action by the latter was one of the fourth class, in which the plaintiff sought to recover for certain materials furnished and work done in installing some electrical wiring, which work plaintiff alleged had been done at the defendant's request. The balance paid for was the amount for which the plaintiff recovered judgment.

It appears from the evidence in the record that the Bureau for Machine Co. installed on the plant in the basement of the Chicago Ice Cream Company. Some time after that work was done, the Ice Cream Company was advised that the plant was not giving satisfaction, and

the defendant sent out its superintendent, one Vogt, who had had charge of the installation of the plant, to investigate the trouble and remedy it, if possible. He reported back to his company the conditions he found, and he recommended that a motor, apparently involved in the ice plant, be moved over to another location. It was decided to do this and the defendant undertook to do it. This involved the installation of some electrical conduit and wiring. The latter work was done by the plaintiffs and forms the basis for the charges on which the plaintiffs brought this action.

The plaintiff, Larson, corroborated by Vogt, testified that the work in question was done for the defendant Ice Machine Company. Burge, president of the defendant company, testified that it was not done for the defendant. He was corroborated by Smith, formerly connected with the Ice Cream Company, who testified that the work in question was done for that company. Larson testified that when the work was done he billed the defendant for it and was directed by both Vogt and Burge to get the amount due from the Ice Cream Company, if possible, as they thought the plaintiffs would be more successful in getting it out of the Ice Cream Company than the defendant would, as the latter was having trouble collecting the amount which the Ice Cream Company already owed them. Larson then admitted that he billed the Ice Cream Company and got a payment on account, and he said he then billed the defendant for the balance. On the other hand, Burge testified that he never got a bill from the plaintiffs for this work or had any idea the plaintiffs were looking to the defendant

the defendant went out the superintendent, one day, who
had had charge of the installation of the plant, so im-
mediately the trouble and remedy it, if possible, as re-
ported back to his company the conditions he found, and
he recommended that a motor, apparently involved in the
last plant, be moved over to another location. It was
decided to do this and the defendant undertook to do it.
This involved the installation of some electrical conduits
and wiring. The latter work was done by the plaintiff's
and turned the basis for the charges on which the plaintiff
brought this action.

The plaintiff, Larson, corroborated by Weger,
testified that the work in question was done for the
defendant in the office of Weger, president of the
defendant company, testified that it was not done for the
defendant. He was corroborated by Smith, formerly connected
with the Ice Green Company, who testified that the work in
question was done for that company. Larson testified that
when the work was done he called the defendant for it and
was directed by both Weger and Burke to get the money due
from the Ice Green Company, if possible, as they thought
the plaintiff would be more successful in getting it out
of the Ice Green Company than the defendant would, as
the latter was having trouble collecting the money which
the Ice Green Company already owed them. Larson then
admitted that he called the Ice Green Company and got a
payment on account, and he said he then billed the defend-
ant for the balance. On the other hand, Burke testified
that he never got a bill from the plaintiff for this work
or had any idea the plaintiff were looking to the defendant

for payment, until over two years after the work was done, when a bill was received from the plaintiffs, which the witness then showed to Vogt and asked him if it involved any matter affecting the defendant, and Vogt said it did not. Burge admitted that after the ice plant was installed by the defendant for the Ice Cream Company, it did not give entire satisfaction, and at his direction Vogt went out to look it over and suggested the moving of a motor; and that Burge directed Vogt to move the motor; that this necessitated some additional wiring and electric conduit, leading to the new location of the motor, and that in order to operate the motor in its new location it was necessary to complete this wiring. The defendant introduced in evidence a copy of the bill it sent to the Ice Cream Company for services rendered in moving this motor, providing a new foundation for it and the changing of the length of a belt. This bill shows that no charges were made by the defendant against the Ice Cream Company covering the electric wiring done by the plaintiffs; Smith testified that Vogt told him, at the time the defendant undertook to move this motor, that the latter was not in the electrical business and would not undertake to supply the additional wiring needed; and, at Smith's request, Vogt then sent for Larson and introduced him to Smith, and that the latter was the one who engaged plaintiffs to do this wiring.

After a careful consideration of all the evidence as we find it in the record, we have come to the conclusion that the finding and judgment appealed from are against the manifest weight of the evidence.

for payment, until over two years after the first was made,
when a bill was received from the plaintiff, which the
defendant then paid to Vegg and asked him if it involved
any matter affecting the defendant, and Vegg said it did
not. Vegg testified that after the law firm was installed
by the defendant for the law firm company, it did not give
written authorization, and at his direction Vegg went out to
look it over and arranged the wiring of the motor; and that
Bryce directed Vegg to move the motor; that this necessitated
some additional wiring and electric conduit, leading to
the new location of the motor, and that in order to operate
the motor in its new location it was necessary to complete
this wiring. The defendant instructed in evidence a copy
of the bill it sent to the law firm company for services
rendered in moving this motor, providing a new foundation
for it and the opening of the length of a belt. This bill
shows that no charges were made by the defendant against
the law firm company covering the electric wiring done by the
defendant, which testified that Vegg told him, at the time
the defendant undertook to move this motor, that the latter
was not in the electrical business and would not undertake
to supply the additional wiring needed; and, at Vegg's
request, Vegg then went for Larson and instructed him to
install, and that the latter was the one who engaged plaintiff
to do this wiring.

After a careful consideration of all the evidence
as we find it in the record, we have come to the conclusion
that the findings and judgments suggested from and against the
defendant weight of the evidence.

While Larson was testifying on cross-examination, he was asked if the plaintiffs had not filed a claim in bankruptcy proceedings, involving the Ice Cream Company, which claim was based on the charges made by the plaintiffs for this electrical wiring. He answered that no such claim in bankruptcy had been filed, to his knowledge. He admitted that he knew what a claim in bankruptcy was and had filed one before. He also admitted that he received \$9.00 which he said was from the "receiver" and he contended that whatever he had done in the way of an attempt to collect from the Ice Cream Company, had been "for the benefit of the Burge Ice Machine Company." He said when he received that payment he "offered it to the Burge Ice Machine Company." He admitted going to an office in the Monadnock Building where he was asked what this claim was for, and "I told them it was for labor and material that was put into that institution," apparently referring to the Ice Cream Company.

Burge testified that when the Ice Cream Company went into bankruptcy, Larson came to him to ask him what he was going to do about getting his money for this work and Burge told him he supposed the only thing for him to do was to file a claim just as everybody else had to. The defendant introduced a certified copy of a claim which the plaintiffs had filed in the bankruptcy proceedings of the Ice Cream Company. That claim was signed and sworn to by the plaintiff, Larson, who was the witness above referred to. In his affidavit filed in connection with that claim, he made oath to the effect that the Ice Cream Company was indebted to him in the sum of \$80.00, which, less the

While Larson was testifying at cross-examination
he was asked if the plaintiff had not filed a claim in
bankruptcy proceedings, involving the Lee Green Company,
which claim was based on the charges made by the plaintiff
for the electrical wiring. He answered that no such claim
in bankruptcy had been filed, to his knowledge. He admitted
that he knew that a claim in bankruptcy was not filed
one before. He also admitted that he received \$2.00 which
he said was from the "company" and he contended that what
every he had done in the way of an attempt to collect from
the Lee Green Company, had been "for the benefit of the
Largo Lee Machine Company." He said when he received that
payment he "knewed it to the Largo Lee Machine Company."
He admitted going to an office in the neighborhood of
where he was asked what this claim was for, and "I said
there it was for labor and material that was put into that
improvement," referring to the Lee Green Company.
Largo testified that when the Lee Green Company
went into bankruptcy, Larson came to him to ask him what
he was going to do about getting his money for this work,
and Largo told him he supposed the only thing for him to
do was to file a claim just as everybody else had to. The
deponent introduced a certified copy of a claim which the
plaintiff had filed in the bankruptcy proceedings of the
Lee Green Company. That claim was signed and sworn to by
the plaintiff, Larson, who was the witness above referred
to. In his affidavit filed in connection with that claim,
he made oath to the above facts and the Lee Green Company
was included as him in the sum of \$200.00, which, less the

dividend of \$8.00 received in the bankruptcy proceedings, is the amount here being sued for by the plaintiffs. He further made oath that the consideration of the debt, which formed the basis of the claim against the bankrupt was as follows: "16 hrs. time at \$2.50 per hour for electrical work and changing the location of 1-30 horse power motor used on ice machine." The record shows that the defendant in the case at bar filed a claim for the balance which the Ice Cream Company owed it at the time that company went into bankruptcy.

In our opinion Larson's testimony is very materially weakened by his statement to the effect that no claim was filed, to his knowledge, in the bankruptcy proceedings, in behalf of the plaintiffs, when the fact was not only that such a claim was filed, but that the witness Larson was the one who swore to it and set out in his affidavit the details of the claim. Moreover, we are of the opinion that the story told by Larson is a very improbable one to the effect that although the plaintiffs did this work for the defendant, they were willing to comply with the suggestion of the latter and bill the Ice Cream Company for it, although the reason given for such a request was that the Ice Cream Company was "shaky", and the defendant was having trouble getting any money out of them; and that the plaintiff would be willing to carry out this suggestion, even to the extent of filing a claim in bankruptcy against the Ice Cream Company. In our opinion the evidence clearly shows that the plaintiffs did this work for the Ice Cream Company, at the direction of Smith, and not for the defendant.

The defendant in the case at bar filed a claim
for the balance which the Los Angeles Company owes it as
shown that the defendant in the case at bar filed a claim
1-10 horse power motor used on the machine". The record
has been fully classified here and showing the location of
the property was as follows: "It was found at \$7.50
the debt which formed the basis of the claim against
it. It further sets forth that the consideration of
\$7.50, in the amount here being owed for by the claim-

At the direction of United, and not for the defendant.

For the reasons we have given the judgment of the Municipal Court of Chicago is reversed with a finding of fact.

JUDGMENT REVERSED WITH A FINDING OFFACT.

FINDING OF FACT:

We find as a fact that the work done by the plaintiffs, which forms the basis of the claim sued for, was not done for the defendant.

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For the purpose of the present investigation the
the principal part of the work is concerned with a study
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JACOB BASS,
Appellee,

v.

SAMUEL R. COOPER,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

In a fourth class action in tort, commenced January 30, 1924, and tried before the court without a jury in February, 1926, there was a finding and judgment against defendant for \$208, and he appealed.

Plaintiff alleged in his statement of claim in substance that during July, 1922, defendant, an insurance broker, after soliciting plaintiff, sold and delivered to him a policy of insurance covering plate glass breakage in the "Northern Casualty Underwriters of America" (hereinafter called the Northern Co.), policy No. 17,476, premium \$115, dated July 10, 1922, and expiring in one year; that on July 31, 1922, plaintiff paid to defendant \$100 in full payment of the premium; that defendant wrongfully converted the money to his own use and negligently failed to pay it to the Northern Co.; that on September 10, 1922, plaintiff sustained a loss, covered by the policy, by breakage of glass in one of his Chicago stores; that after notice the Northern Co. refused to replace the glass or pay the loss, cancelled the policy as of date of issuance and refused to return to plaintiff the unearned portion of the premium; and that the amount of the loss was \$115, and the unearned portion of the premium \$89.34, which sums the defendant, although often requested, had refused to pay. In his affidavit of claim plaintiff fixed the amount of his damages

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN SENATE
JANUARY 10, 1934
REPORT OF THE
COMMISSIONER OF THE
INTERNAL SECURITY

RE. THOMAS EDWARD LEE, ALLEGEDLY KNOWN BY THE NAME OF

IN a fourth class action in 1932, commenced January 30,
1934, and tried before the court without a jury in February, 1935,
there was a finding and judgment against defendant for \$200, and
no appeal.

Plaintiff alleged in his statement of claim in substance
that during July, 1932, defendant, an insurance broker, after
collecting plaintiff's bill and delivered to him a policy of in-
surance covering plate glass windows in the "Northern Casualty
Company of America" (hereinafter called the Northern Co.).
Policy No. 17,470, premium \$110, dated July 10, 1932, and expiring
in one year and on July 31, 1933, plaintiff paid to defendant
\$100 in full payment of the premium; that defendant wrongfully
converted the money to his own use and negligently failed to pay
it to the Northern Co.; that on September 10, 1932, plaintiff was
incurred a loss, covered by the policy, by breakage of glass in
one of his Chicago stores; that after notice the Northern Co.
refused to replace the glass or pay the loss, cancelled the policy
as of date of happening and refused to return to plaintiff the
unearned portion of the premium; and that the amount of the loss
was \$110, and the unearned portion of the premium \$27.50, which
was the defendant, although often requested, has refused to pay.
In his affidavit of claim plaintiff stated the amount of his damages

at the total of the two sums, plus interest thereon, or \$213.81. It appears from the evidence that the actual cost of replacing the glass, paid by plaintiff, was \$100, and the amount of the court's finding is made up of that sum, plus the \$100 which plaintiff had paid to defendant for premium.

In defendant's affidavit of merits he denied he had converted the \$100, or that he failed to pay to the Northern Co. the premium due it for the policy, or that he was liable in damages to plaintiff in any amount. He alleged that, acting as plaintiff's agent, he placed the insurance with the Northern Co.; that he had paid the premium to W. L. Graham & Co. of Chicago, agents for the Northern Co., and holds a cancelled check therefor; and that any claim that plaintiff may have is against W. L. Graham & Co. or said Northern Co., and not against him.

The evidence discloses that shortly before July 10, 1922, defendant, an insurance broker with business office in Chicago, solicited plaintiff to take out through him a policy of plate glass insurance, because an existing policy was expiring, in such company as defendant might select, on glass contained in two of plaintiff's Chicago stores, located at 1,000 S. Racine avenue and 1203-S W. Taylor street; that plaintiff agreed to do so, but apparently upon condition that he be given time within which to pay the premium; and that within a day or two defendant procured and delivered to plaintiff (which plaintiff accepted) a policy, No. 17,476, signed by the Northern Co., by its duly authorized attorney-in-fact, J. A. Arkin, dated and commencing July 10, 1922, and expiring July 10, 1923, premium \$115. In the policy, introduced in evidence, plaintiff is named as the assured, and the insurance is "against any loss or damage by breakage of the glass described in the schedule." It is further provided, inter alia, that no suit for

of the total of the two sums, plus interest thereon, or \$118.21.
It appears from the evidence that the actual cost of replacing the
glass, paid by plaintiff, was \$100, and the amount of the court's
finding is made up of that sum, plus the \$18 which plaintiff had
paid as defendant for premium.
In defendant's affidavit of merits he denied he had ever
received the \$100, or that he failed to pay to the Northern Co. the
premium due it for the policy, or that he was liable in damages for
plaintiff in any amount. He alleged that, acting as plaintiff's
agent, he placed the insurance with the Northern Co.; that he had
paid the premium to J. L. Graham & Co. of Chicago, agents for the
Northern Co., and holds a cancelled check therefor; and that he
claims that plaintiff now owes to Graham & Co. \$100, or
that Northern Co., and not against him.
The evidence discloses that shortly before July 10, 1922,
defendant, an insurance broker with business office in Chicago,
induced plaintiff to take out through him a policy of glass glass
insurance, because an existing policy was expiring, in such company
as defendant might select, on glass contained in two of plaintiff's
display cases, located at 1,400 N. Madison Avenue and 1922-23.
After that time plaintiff agreed to do so, but apparently upon
condition that he be given time within which to pay the premium,
and that within a day or two defendant promised and delivered to
plaintiff (which plaintiff accepted) a policy, No. 17,470, signed
by the Northern Co., by its duly authorized attorney-in-fact, J. L.
Graham, dated and commencing July 10, 1922, and expiring July 10,
1923, pursuant to the policy, introduced in evidence.
Plaintiff is named on the record, and the insurance is "against
any loss or damage by fire or by means of the glass described in the
policy." It is further provided, under title, that no suit for

the recovery of any claim under the policy shall be begun or maintained "unless commenced within 12 months next after the date of loss or damage;" and that the policy "may be cancelled at any time by either of the parties hereto, upon five days' notice in writing to the other party stating when thereafter cancellation shall be effective; if cancelled by the Underwriters the earned premium shall be computed and adjusted upon a pro rata basis." On July 31, 1922, defendant, evidently desiring to obtain at once some of his commissions, proposed to plaintiff that, if he would then pay the premium on the issued policy, he (defendant) would allow him a discount of \$15. Plaintiff accepted the proposition and delivered his check, payable to defendant's order, for \$100, (which subsequently defendant cashed) and at the same time defendant signed in his own name and delivered to plaintiff a receipted bill, dated July 13, 1922, in full for the premium of \$115. During the night of September 18, 1922, some one broke some of the glass, covered by the policy, in one of plaintiff's stores, and on the following morning plaintiff telephoned for defendant at his office, but, not getting him, telephoned the office of the general manager of the Northern Co. in Chicago, advised it of the breakage and the number of the policy which he held, and in reply he was told that the company would at once take up the matter and send out an adjuster, which it did. On September 19th, plaintiff received a registered letter, dated September 18th and signed by the Northern Co., per "J. A. Arkin, attorney in fact," notifying him that "by reason of your failure to pay the premium" the said policy, No. 17,476, "is hereby cancelled and revoked effective as of the date of issuance," and demanding the return of the policy. About this time, according to defendant's testimony, he paid by check to W. L. Graham & Co., Chicago agents of the Northern Co., through

of the total of the two sums, the interest thereon, as follows:
It appears from the evidence that the actual cost of replacing the
glass, paid by plaintiff, was \$100, and the amount of the court's
finding is made up of that sum, plus the sum which plaintiff had
paid as out-of-pocket for premium.

In defendant's affidavit of service he stated he had not
veried the list, or that he failed to pay in the defendant's
premium was 10 for the policy, or that he was liable in damages to
plaintiff in any amount. He alleged that, acting as plaintiff's
agent, he placed the insurance with the Northern Co., that he had
paid the premium to W. L. Graham & Co. of Chicago, agents for the
Northern Co., and holds a cancelled check therefor; and that any
claim that plaintiff may have is against W. L. Graham & Co. or
said Northern Co., and not against him.

The evidence discloses that shortly before July 10, 1922,
defendant, an insurance broker with business office in Chicago,
induced plaintiff to take out through him a policy of fire
insurance, covering an existing policy now expired, in such manner
as defendant might prefer, as also contained in two of plaintiff's
Chicago check, issued at 1,000 E. Madison avenue and dated W.
Taylor stated that plaintiff agreed to do so, but apparently upon
condition that he be given time within which to pay the premium;
and that within a day or two defendant produced and delivered to
plaintiff (which plaintiff accepted) a policy, No. 17,478, signed
by the Northern Co., by its duly authorized attorney-in-fact, J. A.
Smith, dated and commencing July 10, 1922, and expiring July 10,
1923, premium \$10. In the policy, introduced in evidence,
plaintiff is named as the assured, and the insurance is "assigned
any loss or damage by fire or lightning to the glass described in the
schedule." It is further provided, inter alia, that no suit for

the recovery of any claim under the policy shall be begun or maintained "unless commenced within 12 months next after the date of loss or damage;" and that the policy "may be cancelled at any time by either of the parties hereto, upon five days' notice in writing to the other party stating when thereafter cancellation shall be effective; if cancelled by the Underwriters the earned premium shall be computed and adjusted upon a pro rata basis." On July 31, 1922, defendant, evidently desiring to obtain at once some of his commissions, proposed to plaintiff that, if he would then pay the premium on the issued policy, he (defendant) would allow him a discount of \$15. Plaintiff accepted the proposition and delivered his check, payable to defendant's order, for \$100, (which subsequently defendant cashed) and at the same time defendant signed in his own name and delivered to plaintiff a receipted bill, dated July 13, 1922, in full for the premium of \$115. During the night of September 10, 1922, some one broke some of the glass, covered by the policy, in one of plaintiff's stores, and on the following morning plaintiff telephoned for defendant at his office, but, not getting him, telephoned the office of the general manager of the Northern Co. in Chicago, advised it of the breakage and the number of the policy which he held, and in reply he was told that the company would at once take up the matter and send out an adjuster, which it did. On September 19th, plaintiff received a registered letter, dated September 18th and signed by the Northern Co., per "J. A. Arkin, attorney in fact," notifying him that "by reason of your failure to pay the premium" the said policy, No. 17,476, "is hereby cancelled and revoked effective as of the date of issuance," and demanding the return of the policy. About this time, according to defendant's testimony, he paid by check to W. L. Graham & Co., Chicago, agents of the Northern Co., through

the recovery of any claim under the policy shall be deemed to
be maintained "unless commenced within 12 months after the
date of loss or damage," and that the policy "may be cancelled
at any time by either of the parties hereto, upon five days' notice
in writing to the other party stating when thereafter cancellation
shall be effective; it cancelled by the Underwriters the amount
thereon shall be computed and adjusted upon a pro rata basis." On
July 21, 1932, defendant, evidently desiring to obtain a more
at his convenience, proposed to plaintiff that it be void then pay
the premium on the issued policy, he (defendant) would also give him a
check of \$12. Plaintiff accepted the proposition and delivered
his check, payable to defendant's order, for \$100. (When asked
defendant's check) and at the same time defendant signed in
his own name and delivered to plaintiff a receipted bill, dated
July 12, 1932, in full for the premium of \$12. During the night
of September 10, 1932, some one broke into the house, covered by
the policy, in one of plaintiff's stores, and on the following
morning plaintiff telephoned the defendant at his office, but, not
finding him, telephoned the office of the general manager of the
Northern Co. in Chicago, advised it of the breakage and the number
of the policy which he held, and in reply he was told that the
company would at once take up the matter and send out an adjuster.
which is due. On September 15th, plaintiff received a registered
letter, dated September 15th and signed by the Northern Co., per
"J. A. Arlin, attorney in law," notifying him that "by reason of
your failure to pay the premium, the said policy, no. 17,475,
"is hereby cancelled and revised effective as of the date of
cancellation," and demanding the return of the policy. About this
time, according to defendant's testimony, he paid by check to
W. E. Graham & Co., Chicago, agents of the Northern Co., through

whom he had originally procured the policy, the amount of the premium less his commissions. This check, for \$74.75, was introduced in evidence. It is dated September 15th, signed by defendant, payable to the order of W. L. Graham & Co., and is endorsed "W. L. Graham". Over the endorsement are the words "in full payment to Northern Casualty F. G. Policy, No. 17476," and there is another endorsement showing that the check was paid through the Chicago Clearing House on Sept. 19, 1922. It further appears from defendant's testimony, not objected to and not contradicted, that there was a prevailing custom or usage to the effect that brokers had from 60 to 75 days within which to account for premiums on policies issued through their efforts and that such policies were considered to be in force during the period though the premiums had not actually been received by the companies. It further appears from the testimony of both plaintiff and defendant in substance that, when plaintiff saw defendant (just after plaintiff's receipt of the letter of the Northern Co. cancelling the policy) and demanded an explanation, defendant told plaintiff that the premium had been paid by him, that the Northern Co. could not cancel the policy by its terms except upon five days' notice, that no cancellation could become effective from "date of issuance," that, as the Northern Co. had the right to cancel the policy after five days' notice, he would take out for plaintiff another policy in another company, and would endeavor to see to the adjustment and payment by the Northern Co. of the loss, and that, if the company did not pay the loss, he, (defendant) would see his attorney and cause a suit to be brought against it in plaintiff's name to recover the loss and the unearned portion of the premium; that plaintiff agreed to this procedure; that thereafter defendant, through W. L. Graham & Co., procured a second policy and delivered it to plaintiff; that the Northern Co.

...in fact, the plaintiff's policy, the amount of the
premium was \$75.00. This check, for \$75.00, was intro-
duced in evidence. It is dated September 18th, signed by Robert
and payable to the order of W. L. Graham & Co., and is endorsed
"W. L. Graham". Over the endorsement are the words "in full pay-
ment to Northern Company & W. L. Graham, No. 1740", and there is
another endorsement showing that the check was paid through the
Chicago clearing house on Sept. 18, 1922. It further appears that
defendant's testimony, not objected to and not contradicted, that
there was a mailing receipt on Sept. 18, 1922, and that the
check was paid to the order of W. L. Graham & Co. on Sept. 18, 1922.
Policy issued through their efforts and that such policies were
considered to be in force during the period through the premium had
not actually been received by the company. It further appears
from the testimony of both plaintiff and defendant in substance
that, when plaintiff saw defendant's (first) offer plaintiff's receipt
of the letter of the Northern Co. concerning the policy, and defendant
on examination, defendant told plaintiff that the premium had been
paid by him, that the Northern Co. could not cancel the policy by its
failure except upon five days' notice, that no cancellation could
be made effective from "date of issuance", that, as the Northern
Co. had the right to cancel the policy after five days' notice, he
would take out for plaintiff another policy in another company, and
would endeavor to see to the adjustment and payment by the New York
Co. of the loss, and that, if the company did not pay the loss, he,
(defendant) would see his attorney and cause a suit to be brought
against it in plaintiff's name to recover the loss and the amount
of the premium; that plaintiff agreed to this procedure;
(that) thereafter defendant, through W. L. Graham & Co., procured a
second policy and delivered it to plaintiff; that the Northern Co.

persisted in its refusal to pay the loss and defendant caused suit to be brought in plaintiff's name on said policy, No. 17476, against the Northern Co. to recover said loss and the pro rata premium; that the broken glass was replaced by a glazier, whose reasonable bill, rendered to plaintiff for the work, was \$108; and that plaintiff paid said bill.

The second policy above referred to, was introduced in evidence. It is the policy of the "American Liability and Plate Glass Underwriters," and is signed in that name per "W. L. Graham & Company, Attorney in Fact, by W. L. Graham," dated and expiring on the same days and covering the same glass as in the original policy. Subsequently, by agreement between plaintiff and defendant, this second policy was cancelled in February, 1923, and a third policy in a third company procured through defendant as broker and delivered to plaintiff. The suit which defendant had caused to be brought in plaintiff's name on the original policy against the Northern Co. was for some cause either dismissed by the court or withdrawn by plaintiff, and it was not until more than one year after the breakage of the glass (when the right to sue the Northern Co. for the loss had terminated by the terms of its policy) that plaintiff first demanded of defendant that the latter make good his loss, which he refused to do. Defendant testified that, more than a year after the breakage of the glass (September 10, 1922,) he accompanied plaintiff to the office of plaintiff's attorney, who said: "Mr. Cooper, you know the limitation has expired, and I cannot sue the Company any more; the only thing we can do now is to sue you."

Counsel for defendant here contends that the judgment in favor of plaintiff should be reversed because, under the facts in evidence, defendant is not liable for any loss or damage sustained by plaintiff and that the latter's remedy was solely

...to be brought in plaintiff's name on said policy, No. 17478, against
the Northern Co. to recover said loss and the said claim (present)
that the action claim was required by a clause, whose intention
Bill, rendered to plaintiff for the work, was done; and that claim-
city paid said Bill.
The second policy above referred to, was delivered to the
... It is the policy of the "American Liability and Fidelity Guar-
anty Co." and is signed in that name by "J. L. Graham & Company,
attorneys in fact, by J. L. Graham, first and last, on the same
date and covering the same time as in the original policy. There-
fore, by agreement between plaintiff and defendant, this second
policy was cancelled in February, 1902, and a third policy in a third
company procured through defendant as broker and delivered to
plaintiff. The said third defendant had agreed to be brought in
plaintiff's name on the original policy against the Northern Co.
and for some cause either dissolved by the court or withdrawn by
plaintiff, and it was not until more than one year after the
cancellation of the first (when the right to sue the Northern Co. for
the loss had terminated by the terms of the policy) that plaintiff
first demanded of defendant that the latter make good his loss.
which he refused to do. Defendant testified that, more than a year
after the purchase of the first (September 10, 1900), he accompanied
plaintiff to the office of plaintiff's attorney, who said: "Mr.
[?], you know the limitation has expired, and I cannot sue the
company any more; the only thing we can do now is to sue you."
Consequently the defendant here contends that the judgment
in favor of plaintiff should be reversed because, under the facts
in evidence, defendant is not liable for any loss or damage
sustained by plaintiff and that the latter's remedy was solely

against the Northern Co., which was liable under the policy which it issued through the office of its authorized agent, W. L. Graham & Co. While the evidence discloses some unusual facts and circumstances, we agree with the contention. Defendant's testimony, to the effect that he procured for plaintiff the policy through Graham & Co., that within apt time he paid to Graham & Co. the proper portion of the premium which he had received from plaintiff, and that Graham & Co. were authorized agents of the Northern Co. to deliver the policy and receive the premium, is not contradicted. It seems clear to us that the policy was a valid one, that the Northern Co. was liable thereunder for plaintiff's loss occurring on September 10, 1922, that said company could not afterwards lawfully cancel the policy as of its date of issuance and be relieved of liability, and that, because of its refusal and failure to carry out its contract, defendant, considered either as plaintiff's agent or as an agent for the company, cannot be held accountable to plaintiff for the damages which he has sustained. Counsel for plaintiff, arguing for the sustaining of the judgment, contend that the evidence sufficiently shows that defendant, authorized by plaintiff to procure the insurance, was guilty of such a breach of duty and bad faith, in failing immediately to transmit the premium (which he had received from plaintiff) to the insurer, as to render him liable for the resultant damages. We do not think so. We fail to find any evidence of bad faith on defendant's part in this regard. And we think it sufficiently appears that he procured through proper channels and delivered to plaintiff a valid policy for the insurance which he had agreed with plaintiff to procure. Counsel for plaintiff refer us to the case of Evan L. Reed Mfg. Co. v. Farts, 187 Ill. App. 378, in which it is decided in substance that, where an agent neglects to procure the insurance which he has agreed to procure for his principal, or where he obtains

...the Northern Co., which was liable under the policy which
it issued through the office of its authorized agent, W. L. Brown
...the evidence discloses some unusual facts and circumstances.
...we agree with the contention. Defendant's testimony, to
the effect that he procured the plaintiff the policy through Brown
...that within the time he paid to Brown & Co. the premium
...of the premium which he had received from plaintiff, and
...were authorized agents of the Northern Co. to
...the policy and receive the premium, is not contradicted.
It seems clear to me that the policy was a valid one, that the
Northern Co. was liable thereunder for plaintiff's loss, and
...that said company could not abscond with
...the policy as it is a contract of insurance and is not
...and that, because of its terms and conditions
...and its contract, defendant, considered either as plaintiff's
agent or as an agent for the company, cannot be held responsible to
...for the money which he has collected. Counsel for
...the recovery of the money, and that the
...the evidence establishes that defendant, as stated by
plaintiff to procure the insurance, was guilty of such a breach of
duty and bad faith, in failing immediately to transmit the premium
(which he had received from plaintiff) to the insurer, as to render
him liable for the resultant damage. He does not think so. He fails
to find any evidence of bad faith on defendant's part in this
regard. And we think it sufficiently apparent that he procured
through proper channels and delivered to plaintiff a valid policy
for the insurance which he had agreed with plaintiff to procure.
Counsel for plaintiff relies on the case of W. L. Brown & Co.
v. Lumber, 187 Ill. App. 378, in which it is decided in substance
that, where an agent neglects to procure the insurance which he
has agreed to procure for his principal, he is liable.

a policy of insurance which is void or materially defective, or where the principal suffers damage by reason of any act of omission or commission of the agent which constitutes a breach of his duty to the principal, the agent is liable to the principal for any loss or damage sustained. This decision does not sustain counsel's contention under the facts of the instant case, where it appears that defendant procured the requested insurance and delivered to plaintiff a valid and not defective policy therefor, and where the evidence fails to disclose that defendant was guilty of any violation in other particulars of his duty towards plaintiff.

For the reasons indicated the judgment of the municipal court is reversed with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

Fitch and Barnes, JJ., concur.

384 - 31486

FINDING OF FACTS.

We find as facts in this case that defendant agreed to procure for plaintiff insurance for one year on certain of plaintiff's plate glass contained in his Chicago stores; that about July 10, 1922, defendant procured such insurance to be issued by the Northern Co. and delivered to plaintiff the valid policy of that company, No. 17,476, insuring plaintiff against loss or damage by breakage of said glass for the period ending July 10, 1923, subject to cancellation by either party upon five days' written notice; that plaintiff accepted the policy and paid to defendant the premium therefor, which premium, less commissions, defendant in apt time paid to W. L. Graham & Co., agents for the Northern Co. and through whom defendant had procured the issuance of the policy; and that defendant is not liable to plaintiff in this action for any loss or damage sustained by reason of the breakage of some of said glass on September 10, 1922, when the policy was in force and effect.

100 - 11432

ITEMS OF EVIDENCE

It is found as stated in this case that defendant agreed to
procure for plaintiff insurance for one year on certain of
plaintiff's glass business in his Chicago branch; that
about July 13, 1932, defendant procured such insurance as he
learned of the Northern Co. and delivered to plaintiff the policy
bearing the number 17478; assuming plaintiff's liability
loss or damage by fire of said glass for the period ending
July 13, 1932, subject to cancellation by either party upon
five days' written notice; that plaintiff accepted the policy
and paid to defendant the premium therefor, which premium, 1932
premium, defendant in due time paid to T. E. Graham & Co.,
agents for the Northern Co. and through whom defendant had
procured the issuance of the policy; and that defendant is not
liable to plaintiff in this action for any loss or damage sustained
by reason of the breach of said glass on September 10,
1932, when the policy was in force and effect.

245 I.A. 622 #1

370 - 31502

R. S. ZIEHN,
Appellant,
v.
SEBASTIAN MILLER,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

On a trial had without a jury, the court, after hearing the evidence and arguments, found the issues on plaintiff's statement of claim and defendant's set-off against the plaintiff and assessed defendant's damages at \$58.15, and rendered judgment therefor. From such judgment plaintiff appeals.

Plaintiff's statement of claim was for a balance of \$40 on account of professional services and medicines furnished to defendant's wife, after allowing defendant a credit on a tailoring bill for \$161.90. Defendant filed a statement of claim of set-off, alleging in the former that plaintiff's charges were excessive and should not have been more than \$15, and that plaintiff when asked for his bill said his charge was "merely nominal, and that he owed defendant money for suits for many years." The set-off was for the amount of said tailoring bill.

The clerk's record shows that after the filing of said pleadings plaintiff moved the court for judgment against the defendant, and that the court overruled the motion, and that defendant was permitted to file a new set-off, which was in substance the same as the one already on file. Subsequently the hearing was had and judgment entered as aforesaid.

2451 A. 633

2451 - 3133

N. S. L. L. L.

Applicant.

Applicant.

Applicant.

V.

Applicant.

Applicant.

MR. JUSTICE HARRIS DELIVERED THE OPINION OF THE COURT.

On a trial had without a jury, the court, after hearing

the evidence and arguments, found the facts in plaintiff's favor

and of claim and defendant's set-off against the plaintiff and

assessed defendant's damages at \$28.12, and rendered judgment

therefor, from such judgment plaintiff appeals.

Plaintiff's statement of claim was for a balance of

\$28 on account of plaintiff's services as defendant's

as defendant's wife, after allowing defendant a credit on a

collecting bill for \$12.00. Defendant filed a statement of

claim of set-off, alleged as the former that defendant's

charges were excessive and should not have been more than \$12.

and that plaintiff owed said for his wife's services

was merely nominal, and that he owed defendant money for which

for many years. The set-off was for the amount of said

collecting bill.

The court's record shows that after the filing of said

pleadings plaintiff moved the court for judgment against the

defendant, and that the court overruled the motion, and that

defendant was permitted to file a new set-off, which was in

substance the same as the one already on file. Subsequently the

hearing was had and judgment entered as aforesaid.

There is no bill of exceptions in the record, consequently the motion for judgment as aforesaid is not preserved in the record. But appellant urges that such motion had the effect of a demurrer and therefore need not be preserved by a bill of exceptions, citing Harmon v. Callaghan, 236 Ill. 59, (61). If, however, such motion had the effect of a demurrer it was waived by going to trial on the issues raised by said pleadings.

Appellant's only other point raised on the common law record is that the statement of set-off having admitted that defendant received a bill from plaintiff for \$202.75 on June 18, 1925, and not having set out facts in his pleading to show any objection or protest by him from that time to the commencement of the suit, about a year later, was tantamount to an admission of an account stated and that no prior claim could be set-off against it. Plaintiff's cause of action was not on an account stated, and having gone to trial on the issues as made up as aforesaid, he is in no position to raise such question.

The other assigned errors are only such as could be raised on a bill of exceptions. Accordingly the judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

There is no bill of exceptions in the record, consequently the motion for judgment on a demurrer is not preserved in the record. But appellant argues that such motion had the effect of a demurrer and therefore must not be preserved by a bill of exceptions, citing McIntire v. McIntire, 221 Ill. 28, 1911, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Appellant's only other point raised in the common law record is that the statement of fact-only having admitted that defendant entered a bill from plaintiff for \$200.00 on June 12, 1925, and was not paid for it, and that plaintiff in his pleading to show any objection or defense by him from that time to the commencement of the suit, about a year later, was negligent in not obtaining an account stated and that no other claim could be set-off against it. Plaintiff's cause of action was not an account stated, and having gone to trial on the issue as made up on a demurrer, he is in no position to raise such a question.

The object assigned errors are only such as could be raised on a bill of exceptions. Accordingly the judgment is affirmed.

WITNESSES

Sealed, 7:15, and filed, 7:30, 1925.

Notary Public

Notary Public

Notary Public

Notary Public

Notary Public

Notary Public

379 - 31511

LOUIS DeBARTOLA and
ANGELINA DeBARTOLA,
Appellees,

v.

SAM BROCCOLO,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a forcible detainer proceeding instituted by appellees April 14, 1926, for possession of premises in Chicago described as "Flat on second floor of building, rear 787 Forquer Street." The trial was without a jury and the court found defendant guilty of unlawfully withholding said premises, and that the right of possession thereof is in plaintiffs. Defendant has appealed.

Plaintiff Louis DeBartola (whose wife, the other plaintiff, is the sister of defendant) and defendant were the only witnesses in the case. Plaintiffs' claim to the right of possession is predicated upon a certain deed from the mother of his wife, dated October 26, 1925, purporting to convey title to plaintiffs of premises described as "The west half of Lot Seventeen (17) in Block Ten (10) in School Section to Chicago." Other documents conveying title to said last described premises traced such title back to the several heirs at law and next of kin of Frank Broccolo, deceased, among whom are defendant and his sister Angelina DeBartola, one of the plaintiffs. Assuming, from a question put to Louis DeBartola whether the last described property is the "same property," and from the answer, "that is the same," that the property described in said documents is the

same property as that involved in this proceeding, yet the proof is inadequate to show the right of plaintiffs to immediate possession thereof. Plaintiffs served a notice on defendant April 6, 1926, notifying him that \$90 was due for rent on the premises herein involved, and that unless said sum was paid on or before April 12, 1926, "his lease will be terminated." But there is no proof whatever as to how or when defendant came into possession of the premises or by what tenure he held them. It is apparent that defendant was in possession of the property under some form of lease (from whom does not appear) when plaintiffs acquired title to the same, and that after the conveyance to plaintiffs Louis DeBartola in November or December, 1925, notified defendant that he must pay \$15 a month rent, but that defendant refused to make terms with him. No other interview was had between them before these proceedings were brought. There was some evidence that defendant had advanced the sum of \$3,000 in 1921 for the benefit of the estate, to which he and the other heirs at law were beneficiaries, and that out of said sum he was allowed rental on the premises in question up to January 1, of some year, claimed by him to be January 1, 1926. If plaintiffs succeeded to the rights of the lessor to said premises, and the leasehold interest in the same, before they can claim right to the possession as against defendant as lessee, they should make proof of the terms of the lease and their right to possession thereunder. They have failed to make such proof. The mere fact that Louis DeBartola and his wife acquired title as aforesaid and notified defendant that he must pay \$15 a month thereafter and he refused to do it, did not establish the relationship of landlord and tenant between plaintiffs and defendant, and the right to fix new

some property as that involved in this proceeding, yet the court
is inclined to view the right of plaintiff as paramount
possessive interest. Plaintiff conveyed a notice of defendant's
April 4, 1932, notifying him that the law firm of the
business parties involved, and that notice said that the law firm
or before July 15, 1932, "his name will be returned." The
there is no great question as to how it was defendant was not
possession of the premises or by what means he held them. It
is apparent that defendant was in possession of the property
under some title of law (from whom now not clear) that plaintiff
title acquired title to the same, and that after the conveyance
to plaintiff's local property in November of December, 1931,
notified defendant that he must pay \$15 a month rent, and that
defendant refused to make same with him. No other action
was had between them before these proceedings were brought. There
was some evidence that defendant had advanced the sum of \$1,000
in 1931 for the benefit of the estate, to which he and the other
parties at law were beneficiaries, and that out of said sum he was
allowed rental on the premises in question up to January 1, 1932.
Some rent, claimed by him to be January 1, 1932. If plaintiff
entitled to the rights of the tenant to said premises, and the
landlord interest in the same, before they can claim right to the
premises as against defendant as tenant, they should make good
of the terms of the lease and their right to possession thereunder.
They have failed to make such good. The mere fact that Louis
Bertrando and his wife acquired title as tenants and notified
defendant that he must pay \$15 a month thereafter and he refused
to do so, did not establish the relationship of landlord and
tenant between plaintiff and defendant, and the right to the now

terms of rental from November 1, 1928. There was no proof of attornment to plaintiffs or of the terms of the lease under which they undertook to exercise the same right as the lessor therein. As the evidence is insufficient to sustain the judgment it must be reversed, and the cause will be remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

... of ... from November 1, 1933. ...
... as ... of the ...
... which they ...
... as the ...
... judgment ...
... for a new trial.
... and ...

Griffin, et al., and ...

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6023471-622#3
RENEE L. BARNSTEAD,
Appellee,

v.

GEORGE F. NIXON & COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against the defendant for \$3750, claimed by the plaintiff as a commission for her services as a real estate saleswoman in defendant's employ, at the rate of 7½ per cent on the purchase price of \$50,000 for the land sold. The issues were found for plaintiff in a trial before the court without a jury.

The grounds for reversal argued relate to questions of fact and alleged error in excluding evidence.

As to the facts it is claimed in substance that plaintiff did not prove her employment or that she secured the purchaser for the property in question. With these contentions we cannot agree.

No question arises that plaintiff was in the employ of defendant at the time negotiations were taken up with Goldman, the purchaser of the property in question. She worked in a division of defendant's real estate office under the joint management of one Hake and one Erickson. She was admittedly hired by Hake to work as saleswoman on a commission of 5 per cent, which, before the transaction in question was raised to 7½ per cent. As testified to by Hake, her duty was to find someone who wanted to buy property that Nixon & Company sold. The property in

341-1003

Page 2 of 2

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

IN SENATE
JANUARY 1, 1934
JANUARY 1, 1934
JANUARY 1, 1934
JANUARY 1, 1934

IN SENATE
JANUARY 1, 1934

STATE OF CALIFORNIA

This is an appeal from a judgment against the defendant for \$1750, claimed by the plaintiff as a commission for her services as a real estate saleswoman in defendant's employ, at the rate of 7 1/2 per cent on the purchase price of \$25,000 for the land sold. The issues were tried for plaintiff in a trial before the court without a jury.

The grounds for reversal argued relate to questions of fact and alleged error in excluding evidence. As to the facts it is claimed in substance that plaintiff

did not prove her employment or that she secured the purchase of the property in question. With these contentions we cannot agree.

No question arises that plaintiff was in the employ of defendant at the time negotiations were taken up with defendant, the purchase of the property in question. She worked in a division of defendant's real estate office under the joint management of two salesmen and one broker. She was admittedly aided by him in her work as a saleswoman on a commission of 7 1/2 per cent, which, before the transaction in question was raised to 7 1/2 per cent. As

testified to by him, her duty was to find someone who wanted to buy property that Nixon & Company sold. The property in

question was on defendant's list for its agents to sell. Plaintiff lived at the Edgewater Beach Hotel, Chicago. On a Saturday evening she there met Goldman, who lived in Indiana. He asked her 'if she had a good, vacant corner for him,' and arranged to go with her the following Monday to see a corner in one of defendant's subdivisions. She reported the "prospect" and arrangement to Hake, her superior, who agreed to take them in his automobile. They visited both the corner lot referred to and another corner, neither of which interested Goldman. Plaintiff then suggested that he be shown Miles Center, where she showed him the property in question. Goldman was at once interested. Hake thought the property had been sold. Plaintiff thought not and on inquiry found that the property was still available and called up Goldman the next morning and so informed him. He told her he was interested, and had learned that he had a cousin by the name of Friedstein connected with Nixon & Company, with whom he would like to talk before doing anything else. She assented. He telephoned Friedstein, who came to see him at the hotel and told him that it would be a wonderful buy if he could get the property at the price he offered. The price given him was \$57,000, and he had offered \$50,000. He and Friedstein then went out to see the property again. After making inquiries of others he drove back to the office and deposited \$1,000, conditional upon defendant's accepting his offer, and apprised plaintiff of what had been done, and left for his home. About a week later he received a letter from Nixon & Company accepting his offer. Goldman testified to the facts as above stated, corroborating plaintiff's account of the matter, and these facts were not refuted.

It thus appears that plaintiff as saleswoman for defendant brought Goldman's attention to the property, that the

question was on defendant's list for its agents to call. Defendant
lived at the Ambassador Beach Hotel, Chicago, on a Saturday
evening she came out defendant, who lived in Indiana. He asked
her if she had a good, vacant corner for him, and arranged to
go with her the following Monday to see a corner in one of
defendant's subdivisions. She requested the "percentage" and
arrangement to him. Her agent, who agreed to take him in
his automobile. They visited both the corner lot referred to
and another corner, neither of which interested defendant. When
left then suggested that he be shown White Center, where she
showed him the property in question. Defendant was of some in-
terest. He thought the property had been sold. Defendant
thought not and on inquiry found that the property was still
available and called up defendant the next morning and so informed
him. He told her he was interested, and had learned that he had
a cousin by the name of Tristram located with Nixon & Company,
with whom he would like to talk before doing anything else. She
assented. He telephoned Tristram, who came to see him at the
hotel and told him that it would be a wonderful way if he could
get the property at the price he offered. The price given him was
\$27,000, and he had offered \$20,000. He and Tristram then
went out to see the property again. After making inquiries of
others he drove back to the office and deposited \$1,000, conditional
upon defendant's accepting his offer, and expressed himself as what
had been done, and left for his home. About a week later he re-
ceived a letter from Nixon & Company accepting his offer. Defendant
testified in the facts as above stated, corroborating plaintiff's
account of the matter, and these facts were not controverted.
It thus appears that plaintiff as well as defendant, had the
defendant brought defendant's attention to the property, that the

negotiations thus begun continued without a break to the consummation of the deal, and that she thus became the efficient and procuring cause of the sale. That others assisted in closing the transaction does not affect that fact. It was not necessary, either by the contract made with her or the practice in the office, that the sales agent should carry the transaction through to its close.

The contract with plaintiff was verbal. Her commission was gradually raised from 5 to $7\frac{1}{2}$ per cent. She was working under an arrangement for the latter commission at the time of the transaction in question. It is not disputed that she was to receive $7\frac{1}{2}$ per cent on sales of lots in defendant's subdivisions. The only contention of defendant with regard thereto is that $7\frac{1}{2}$ per cent was paid only on sales of "subdivided property" sold by Nixon & Company, and that special arrangements were made for commissions on other property on its sales list. Defendant's evidence, however, not only fails to show that the property in question came within the scope of such arrangements but that any such arrangement was made with the plaintiff. The weight of the evidence was clearly to the contrary. Plaintiff testified that no such arrangement was made with her, and defendant's director of sales and vice-president in charge thereof at the time of the negotiations in question, testified for plaintiff that said property was on defendant's list of property subject to sale under the regular terms and commissions, and that plaintiff's commission was $7\frac{1}{2}$ per cent. He was not cross-examined. From such positive evidence the court was amply justified in finding that plaintiff was the procuring cause of the sale and entitled to a commission of $7\frac{1}{2}$ per cent.

The only other question of fact was whether plaintiff's claim was vitiated by the exercise of bad faith, as claimed,

negotiations from being continued without a break in the same
continuation of the fact, and that the same person, the defendant,
and receiving some of the sales. That others appeared in connection
the transaction does not affect that fact. It was not necessary
either of the parties made with me on the premises in the office
that the sales agent should bring the transaction through to the
close.
The contract with plaintiff was verbal. The commission
was verbally agreed from 5 to 7 1/2 per cent. The was verbal matter
an arrangement for the latter commission at the time of the
transaction in question. It is not disputed that she was to re-
ceive 7 1/2 per cent on sales of lots in defendant's subdivision.
The only contract of defendant with regard thereto is that 7 1/2
per cent was paid him on sales of "restricted property," and he
gives a receipt, and that special arrangements were made for
commissions on other property on the sales list. Defendant's
evidence, however, not only fails to show that the property in
question came within the terms of such arrangements but that any
such arrangement was made with the plaintiff. The weight of
the evidence was clearly in the contrary. Plaintiff testified
that no such arrangement was made with her, and defendant's
evidence of sales and vice-versa in charge thereof at the time
of the negotiations in question, testified for plaintiff that such
property was on defendant's list of property subject to sale under
the regular terms and commissions, and that plaintiff's commission
was 7 1/2 per cent. He was not cross-examined. From such positive
evidence the court was amply justified in finding that plaintiff
was the receiving owner of the sale and entitled to a commission
at 7 1/2 per cent.
The only other question of fact was whether plaintiff's
claim was vitiated by the operation of her failure to claim.

in attempting to obstruct the sale. Before the sale was consummated plaintiff was discharged from defendant's employ on the claim that she represented over the telephone to Goldman that the property had been offered for a less price. Plaintiff admitted that he had been so told but that was before other property was added to said corner. Not only was defendant's proof of her talk over the telephone very uncertain in its character but both she and Goldman denied that any such conversation as claimed took place. We do not think defendant established the claim of bad faith on the part of plaintiff.

Error is claimed in the exclusion of evidence. Plaintiff was called to testify before the real estate commission and board of registration respecting the matter of said conversation. She was asked whether or not she did not make certain statements in her testimony. She either denied or said she did not remember making such statements. A member of the commission was called by defendant and asked the general question "what she testified to." The court properly sustained objection to the question. It is unnecessary to say that a question in that form for the purpose of impeachment is objectionable.

The court also ruled against defendant's offer to show the custom and practice in its office in distinguishing between "subdivision property" and "brokerage property," as to the terms, methods and conditions of sale of each, and as to the commission to be paid thereon. It is enough to say in support of the court's ruling that the offer did not purport to show an existing usage or custom in real estate offices in general or as practiced by real estate agents or brokers, but merely a usage or custom in defendant's office. But whatever was the custom or usage in said office it would be unavailing in view of the positive, undisputed

testimony of defendant's director of sales, as aforesaid, that this particular property was subject to a commission of $7\frac{1}{2}$ per cent.

We find no reversible error in the record.

Accordingly the judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

testimony of defendant's character of course, as also
that this particular testimony was subject to a commission
of 75 per cent.

It is a terrible error in the record.
Consequently the judgment is affirmed.

REVEREND

Witness, J. L. and J. L., sworn.

THE COURT: The first witness called is the State's witness.
The State's witness is called to the stand.
The witness is sworn.
The witness is asked the following question:
"Do you know the defendant?"
The witness answers: "Yes, I do."

THE COURT: The second witness called is the defendant's witness.
The defendant's witness is called to the stand.
The witness is sworn.
The witness is asked the following question:
"Do you know the defendant?"
The witness answers: "Yes, I do."

THE COURT: The third witness called is the State's witness.
The State's witness is called to the stand.
The witness is sworn.
The witness is asked the following question:
"Do you know the defendant?"
The witness answers: "Yes, I do."

31967

VICTORY WET WASH LAUNDRY COMPANY,
a corp., and SUNNYSIDE WET WASH
LAUNDRY COMPANY, a corp.,

Appellee,

v.

CHARLES HENNER and HERMAN SWANSON,

Appellants.)

INTERLOCTORY APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion
of the court.

By this appeal the defendants seek to reverse
an order overruling their motion to dissolve a temporary
injunction.

On March 9, 1927, complainants, the Victory
Wet Wash Laundry Company and the Sunnyside Wet Wash Company,
filed their verified bill praying that the defendants be
enjoined from doing any laundry business or soliciting the
Victory Laundry Company's customers and patrons, within a
specified district in Chicago. Afterwards, by leave of
court, the bill was amended and on March 15th an order
was entered awarding the writ of injunction as prayed for.
On March 21st, defendants filed their verified answer
and afterwards made a motion to dissolve the injunction.
The motion came on to be heard upon the verified bill of
complaint as amended, the verified answer of the defend-
ants and affidavits on behalf of both parties, and after
hearing, the motion to dissolve was denied and this appeal
followed.

SS 4 12

1887

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

IN RE THE ESTATE OF
JAMES M. SMITH
DECEASED

THE UNITED STATES OF AMERICA

vs.

By this appeal the defendant seeks to reverse the order granting their motion to dissolve a temporary injunction.

On March 9, 1887, complainant, the Victory Laundry Company, and the defendant, the Smiths, filed their verified bill praying that the defendant be enjoined from doing any laundry business or collecting the Victory Laundry Company's accounts and patronage, within a specified district in Chicago. Afterwards, by leave of court, the bill was amended and on March 15th an order was entered regarding the title of injunction as prayed for. On March 21st, defendant filed their verified answer and afterwards made a motion to dissolve the injunction. The motion came on to be heard upon the verified bill of complaint as amended, the verified answer of the defendant and affidavits on behalf of both parties, and after hearing, the motion to dissolve was denied and this appeal follows.

The record discloses that the defendants were conducting a laundry located at No. 1334 Belmont avenue, Chicago, and on September 11th, 1936, executed their bill of sale whereby they sold to Abraham Cohen, Morris Levin, Irving Friedman and Sam Snider, all of their right, title and interest in and to the said laundry business and the good will thereof, the same consisting of customers, patrons and agents doing business with us, and the following machinery, automobile trucks and other personal property located at No. 1334 Belmont avenue, Chicago." Then follows an itemized list of the personal property, which is in the ordinary machinery and apparatus used in the conduct of a laundry business including a Willey Ellis washing machine on which there is stated to be an unpaid balance of \$1168.00. The consideration mentioned was \$10,832.00. By the bill of sale the defendants further agreed that they would "warrant and defend unto the vendees herein that we will not either directly or indirectly, divulge or make known, either directly or indirectly, to any person, firm or corporation, whatsoever, the names or addresses of the said customers, patrons or agents doing business with the said parties of the first part, and that we will not personally either for ourselves or for any person, firm or corporation, solicit the trade or business of the persons, customers, patrons or agents that are now doing business with the aforementioned laundry, for a period of two years from this date." And there was a further provision empowering the purchasers "their agents or assigns" to bring immediate injunction proceedings against the sellers in the event the defendants violated the provisions of the bill of sale.

The record discloses that the defendants were
conducting a laundry located at No. 1334 Belmont Avenue,
Chicago, and on September 15th, 1933, executed their bill
of sale whereby they sold to Thomas G. Davis, Morris Lewis,
Living Friedman and Sam Kaiter, all of their right, title
and interest in and to the said laundry business and the
good will thereto, the same consisting of customers, patron
and agents doing business with us, and the following machinery,
automobile trucks and other personal property located at
No. 1334 Belmont Avenue, Chicago. When follows an itemized
list of the personal property, which is in the ordinary
machinery and equipment used in the conduct of a laundry
business including a Willy Kille washing machine on
which there is stated to be an unpaid balance of \$1100.00.
The consideration mentioned was \$10,000.00. By the bill
of sale the defendants further agreed that they would
"warrant and defend unto the vendee herein that we will
not either directly or indirectly, assign or make known,
either directly or indirectly, to any person, firm or
corporation, whatsoever, the names or addresses of the said
customers, patrons or agents doing business with the said
laundry at the time past, and that we will not personally
either for ourselves or for any person, firm or corporation,
solicit the trade or business of the persons, customers,
patrons or agents that are now doing business with the above-
mentioned laundry, for a period of two years from this date."
and there was a further provision empowering the purchasers
"their agents or assigns" to bring immediate injunction pro-
ceedings against the sellers in the event the defendants vio-
lated the provisions of the bill of sale.

It further appears that upon the execution of the bill of sale by the defendants the purchasers paid \$6,000.00 in cash and gave back a chattel mortgage to secure the payment of the balance of the purchase price, viz: \$5,332.00; the chattel mortgage describes the property covered by it in detail and sets up the various machines and other personal property as stated in the bill of sale, and it is stated in the chattel mortgage, after describing the property, that it is all located at No. 1334 Belmont avenue. But the chattel mortgage does not in terms contain the following which is mentioned in the bill of sale "all our right, title and interest in and to the said laundry business and the good will thereof, the same consisting of customers, patrons and agents doing business with us." A few days after the execution of the bill of sale and the chattel mortgage the purchasers by bill of sale sold the property to the Sunnyside Wet Wash Laundry Company, a corporation, one of the complainants, subject to the chattel mortgage. This corporation was organized and apparently all of the stock was owned by the four men who had purchased the property from the defendants. It further appears that the laundry business conducted by the Sunnyside Laundry Company was not successful and it practically ceased to do business December 29, 1926, and on January 3, 1927, the Sunnyside Laundry Company by bill of sale sold to the complainant, the Victory Wet Wash Laundry Company, a corporation, "two laundry routes and the good-will thereof, the same consisting of customers, patrons and agents regularly doing business with" the

It further appears that upon the execution of
the bill of sale by the defendant the plaintiff paid
\$2,000.00 in cash and gave back a dated mortgage to
secure the payment of the balance of the purchase price,
viz: \$2,328.00; the stated mortgage described the prop-
erty covered by it in detail and one of the parties
executed and acknowledged the same as stated in the
bill of sale, and it is stated in the stated mortgage,
after describing the property, that it is all located at
No. 1111 Market Street, and the stated mortgage does
not in terms contain the following which is contained in
the bill of sale "All the right, title and interest in
and to the said laundry business and the good will thereof,
the same consisting of customers, patrons and agents doing
business with me." A few days after the execution of the
bill of sale and the stated mortgage the defendant by
bill of sale sold the property to the defendant and
with laundry company, a corporation, one of the parties
executed to the stated mortgage. This corporation
was organized and exclusively all of the stock was owned by
the last man who had purchased the property from the
defendant. It further appears that the laundry business
conducted by the defendant laundry company was not contin-
ued and it practically ceased to do business between No.
1111 and on January 3, 1907, the defendant laundry company
by bill of sale sold to the plaintiff, the Victory
Laundry Company, a corporation, two laundry routes
and the good-will thereof, the same consisting of customers,
patrons and agents regularly doing business with the

Sunnyside Laundry Company. Then follows a description of the territory wherein the two routes are located in Chicago. There was a further provision that the Sunnyside Laundry Company would warrant and defend the purchaser; that it would not directly or indirectly divulge the names or addresses of the customers, patrons or agents included in the laundry, and that it would not solicit trade or business from such persons, patrons or customers, within the specified territory, for a period of five years and the Victory Laundry Company, its agents or assigns were authorized to bring injunction proceedings in case of violation of any of the terms of the bill of sale. It further appears that the principal place of business of the Victory Laundry was at No. 3100 West Harrison street, Chicago and that upon the execution of the bill of sale on January 3rd conveying the two laundry routes as above stated, the Victory Laundry Company proceeded to do business with the patrons and customers mentioned in those routes.

The record further shows that afterwards on February 4th the Sunnyside Laundry Company, by bill of sale, conveyed back to the defendants, the laundry machinery and other apparatus located at No. 1334 Belmont avenue. This sale was not in consideration of the defendants releasing the Sunnyside Laundry from the indebtedness secured by the chattel mortgage and which the Sunnyside Laundry Company had assumed and agreed to pay when it purchased the property from the four individuals who had bought it

Sanitary Laundry Company. From follows a description of the property which the two parties are located in Chicago. There was a further provision that the Sanitary Laundry Company would remove and defend the property; that it would not directly or indirectly divide the same or portions of the same, but would sell the same in the laundry, and that it would not collect trade or business from such persons, persons or persons within the specified territory, for a period of five years and the Sanitary Laundry Company, its agents or assigns were authorized to bring injunction proceedings in case of violation of any of the terms of the bill of sale. It further appears that the original bill of sale of the Sanitary Laundry was at No. 1100 West Madison Street, Chicago and that upon the execution of the bill of sale the Sanitary Laundry had conveyed the two laundry houses as above stated. The Sanitary Laundry Company proceeded to its business with the parties and customers mentioned in these

The record shows that the Sanitary Laundry Company, in 1911, sold, conveyed and to the defendant, the Sanitary Laundry, and other parties located at No. 1204 Belmont Avenue. This sale was not in violation of the defendant's record. The Sanitary Laundry from the defendant's account by the United States and which the Sanitary Laundry Company had assumed and agreed to pay when it was made the property from the two individuals who had bought it

from the defendants. A further consideration was that the Sunnyside Laundry Company was released from a lease it had taken of the premises on Belmont avenue wherein the laundry was conducted and in addition the Sunnyside Laundry Company paid \$600.00, part of which was to be used by the defendants in payment of bills then due and owing by the Sunnyside Laundry Company.

It further appears by affidavits submitted on behalf of the defendants that shortly after the Sunnyside Laundry Company ceased to do business on December 29, 1926, negotiations were had between it and the defendants, with a view of the defendants taking back the laundry on Belmont avenue and releasing the Sunnyside Laundry Company and this was finally consummated on February 4, 1927. The president of the Victory Laundry Company took part in such negotiations. These facts are conceded, but the affidavits submitted on behalf of the defendants are further to the effect that the president of the Victory Laundry Company during these negotiations never informed the defendants that it had purchased the two laundry routes from the Sunnyside Laundry Company. On the other hand, an affidavit submitted on behalf of the complainants, sets up that during these negotiations the defendants had been advised that the Laundry Company had purchased the two routes mentioned.

There was also submitted on behalf of the complainants an affidavit by Morris Levin, one of the four persons who had purchased the laundry from the defendants

-2-

from the defendant. A further investigation was made and the Company's laundry company was released from a lease it had taken of the premises on Belmont Avenue opposite the laundry was conducted and in addition the Company's laundry company held \$1000.00, more or less, was to be used by the defendant in payment of bills then due and owing by the Company and laundry company.

It further appears by affidavits submitted on

behalf of the defendant that shortly after the Company's laundry company ceased to do business on December 20, 1935, negotiations were had between it and the defendant, with a view of the defendant taking back the laundry on Belmont Avenue and releasing the Company's laundry company and this was finally consummated on February 4, 1937, the president of the Victory Laundry Company took part in such negotiations. From facts are connected, but the affidavit submitted on behalf of the defendant are further to the effect that the president of the Victory Laundry Company during these negotiations never informed the defendant that it had purchased the two laundry trunks from the Company's laundry company, or the other hand, as affidavits submitted on behalf of the defendant state, with up that during these negotiations the defendant had been advised that the laundry company was to be released and the trunks returned.

There was also submitted on behalf of the defendant an affidavit by Maria Lewis, one of the four persons who had purchased the laundry from the defendant

on September 11, 1926, and who afterwards became one of the incorporators and secretary of the Sunnyside Laundry Company wherein he states that he was then employed by the Victory Laundry Company and that on the date of the purchase of the laundry by the four persons from the defendants September 11, 1926, a number of persons were present including the attorneys for the parties, and that the matter of securing payment, to the defendants of the balance of the purchase price of the laundry, was discussed for several hours; that the sellers (the defendants) insisted that the chattel mortgage, which was to be given to secure the balance of the purchase price \$5332.00, should include the good-will of the business, but that counsel for the purchasers objected to this, "saying in substance that the purchaser should keep something that was not mortgaged to fall back upon as it might be necessary for them to borrow money to properly conduct the business" and that accordingly the chattel mortgage did not cover the good will of the laundry.

Upon a careful consideration of the entire record before us, which as stated consists of the verified bill as amended, the verified answer and affidavits, there being no testimony or other evidence introduced before the chancellor, we are of the opinion that the laundry and all the property sold by the defendants on September 11, 1926 was intended to be covered by the chattel mortgage executed on that date by the purchasers, including the good will of the business, although the affidavit above quoted from is

on September 11, 1936, and the affidavit became one of the incorporators and secretary of the Garvey Laundry Company. He states that he was then employed by the Garvey Laundry Company and that on the date of the purchase of the laundry by the four persons from the defendant September 11, 1936, a number of persons were present including the attorney for the parties, and that the matter of securing payment, to the defendant of the balance of the purchase price of the laundry, was discussed for several hours; that the witness (the defendant) insisted that the chattel mortgage, which was to be given to secure the balance of the purchase price \$2222.00, should include the good-will of the business, but that counsel for the purchaser objected to this, saying in substance that the purchaser should keep something that was not necessary to him back upon as it might be necessary for them to borrow money to properly conduct the business, and that accordingly the chattel mortgage did not cover the good will of the laundry.

Upon a careful examination of the entire record before me, which as stated consists of the verified bill as amended, the verified answer and affidavits, there being no testimony or other evidence introduced before the court, we are of the opinion that the laundry and all the property sold by the defendants on September 11, 1936 was intended to be covered by the chattel mortgage executed on that date by the purchasers, including the good will of the business, although the affidavit above quoted from is

to the effect that the good will was intentionally excluded because the purchaser might want to borrow money upon such good will. Of course, no rational person would loan money and rely only on such good will as security. The records shows without dispute that the several articles, machinery and personal property belonging to the laundry were of little or no value without the good will, which includes the list of customers of the laundry, and with this in mind, we think it apparent on this record the defendants, acting as reasonable men, would not have taken back the old machinery and released the Sunnyside Laundry Company from liability for the balance of the unpaid purchase price, viz: \$5,332.00, and release them from liability on the lease covering the premises wherein the laundry was located without the good will. We think the court should have sustained the defendant's motion and dissolved the temporary injunction.

For the reasons stated the order appealed from is reversed.

ORDER REVERSED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

to the effect that the good will was intentionally excluded
from the purchase price. The purchaser might want to know what the
good will was, and what it was for. The good will was
not only an asset but also a liability. The purchaser
must know what it was for. The good will was not
and personal property belonging to the seller. The
list of assets of the company, and with this in
mind, we think it is important on this record the
noting as reasonable men, would not have been able to
old company and received the complete inventory of
from liability for the balance of the assets of the
price, viz: \$2,500.00, and balance from the
on the basis covering the purchase price for the
was paid about the good will. The good will
should have included the business, which was
the company's liability.

Let the record state the order of the
is reversed.

ORDER REVERSED.

THE PEOPLE OF THE STATE OF NEW YORK,

County of New York, ss. I, the undersigned, Judge of the

County of New York, do hereby certify that the within

document is a true and correct copy of the original

document on file in the office of the County Clerk

of New York, and that the same is a true and correct

copy of the original document on file in the office

of the County Clerk of New York.

382 - 24735

SOL SEGAL, a minor, by
David Segal, his next
friend,

Appellee,

v.

24735

THE CHICAGO CITY RAILWAY
COMPANY,

Appellant.

APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

245 I.A. 622 #5

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a personal injury suit in which there was a verdict and judgment for the plaintiff. December 2, 1919, we rendered a decision, reported in 216 Ill. App. 11, reversing the judgment as being against the weight of the evidence, and entered judgment here for defendant with a finding of fact, in accordance with the procedure that then obtained upon reaching such conclusion. Since that time, however, in Mirich v. Forschner Contracting Company, 312 Ill. 343, the Supreme Court has held that where the evidence tends to support the cause of action such procedure deprives the plaintiff of the constitutional right of trial by jury. After that decision the case at bar was taken to the Supreme Court on a writ of error, and in accordance with the decision in the Mirich case our judgment in this case was reversed with direction in the usual form that we either affirm the judgment of the lower court or reverse the same and remand the cause for a new trial. Thus the case comes before us again for review.

The errors assigned involve determining the weight of the evidence. As already stated, we held in our former decision that the verdict was manifestly against its preponderance. In

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reaching the same conclusion upon reconsideration of the case it would subserve no useful purpose to repeat or rediscuss the evidence, as the salient and controlling features of which are set forth in our former opinion, to which reference is hereby made. Having reached that conclusion it becomes necessary to reverse the judgment and remand the cause for a new trial, which is accordingly done.

REVERSED AND REMANDED.

Gridley and Wells, JJ., concur.

reaching the same conclusion upon consideration of the facts. It would therefore be proper to regard as reliable the evidence, as the earliest and controlling evidence of value and not facts in our former opinion, in which reference is made. Having reached that conclusion it becomes necessary to reverse the judgment and remand the case for a new trial.

which is respectfully done.

REVEREND THE HONORABLE.

SHIRLEY and WELLS, JJ., concur.

WILLIAM BOTTOMS,
Defendant in Error,

v.

ALMA HOLT,
Plaintiff in Error.

} ERROR TO MUNICIPAL
} COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiff (defendant in error) brought an action in tort against Alma Holt and Fred Holt, alleging that plaintiff had leased to them a furnished apartment and they had maliciously destroyed certain articles of personal property therein, including some rugs. The judgment sought to be reversed was against Alma Holt for \$400. The action was dismissed as to Fred Holt.

Two grounds are urged for reversal; (1) that the judgment is against the weight of the evidence, and (2) that the court admitted improper evidence as to the damages.

The latter ground is well taken. Plaintiff undertook to prove damages only to the rugs. He bought the rugs in 1919. They had been used by him until he leased the apartment with said rugs and other furnishings to the Holts about November 1, 1922. They continued to use them until the last of January, 1923. Plaintiff introduced evidence to the effect that about the latter date Alma Holt poured lye or other chemicals on the rugs causing holes to appear in them, which were discovered some time after they gave up the premises.

There was no competent evidence from which the damage could be ascertained. Plaintiff merely proved the retail price on January 1, 1923, of rugs of like description of these

245 I.A. 623

10 - 2100

ORDER TO REVOKE
JUDICIAL NOTICE

ALLIANCE
Statement is given
W. J. ...
ALLIANCE
Statement is given

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Plaintiff (defendant in error) brought an action in
last against John Hall and Fred Hall, alleging that plaintiff
had leased to them a furnished apartment and they had maliciously
destroyed certain articles of personal property therein, including
some rugs. The judgment sought to be reversed was against John
Hall for \$400. The action was dismissed as to Fred Hall.
The grounds are urged for reversal (1) that the judgment
is against the weight of the evidence, and (2) that the court
admitted improper evidence as to the damages.
The latter ground is well taken. Plaintiff undertook
to prove damages only to the rugs. He brought the rugs in 1910.
They had been used by him until he leased the apartment with said
rugs and other furnishings to the Halls about November 1, 1921.
They continued to use them until the last of January, 1922.
Plaintiff introduced evidence to the effect that about the latter
date John Hall poured kerosene or other chemicals on the rugs causing
holes to appear in them, which were discovered some time after
they gave up the premises.
There was no competent evidence from which the damage
could be ascertained. Plaintiff merely proved the retail price
on January 1, 1922, of rugs of like description of those

injured, which were purchased in 1919. It did not appear that they were absolutely destroyed or beyond repair. If not beyond repair, the measure of damages would be the reasonable cost of necessary repair or replacing them. (McDonnell v. Lake Erie & Western Ry. Co., 208 Ill. App. 442, 458, and cases there cited; Corpus Juris, 190, sec. 154.)

For error in receiving incompetent evidence to show the damages sustained the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley and Wells, JJ., concur.

348 - 31480

CITY OF CHICAGO,
Appellant,

v.

CHICAGO RAILWAYS COMPANY,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal from a judgment for costs against the City involves the same questions of fact and law as the appeal in case No. 31479, with which it has been consolidated for hearing, and in which we have this day filed an opinion affirming a like judgment. That is there said is applicable to this case, and for reasons there stated the judgment herein appealed from is affirmed.

AFFIRMED.

Gridley and Wells, JJ., concur.

245 I.A. 623

245 - 1165

ATTORNEY GENERAL
COURT OF COMMONS

CITY OF CHICAGO
CHICAGO RAILWAY COMPANY
Appellee

MR. JUSTICE THOMAS
DELIVERED THE OPINION OF THE COURT.

This appeal from a judgment for costs against the City involves the same questions of fact and law as the appeal in case No. 21475, with which it has been consolidated for hearing, and in which we have this day filed an opinion affirming a like judgment. What is there said is applicable to this case, and for reasons there stated the judgment herein appealed from is affirmed.

ATTORNEY.

Grigley and Wells, 11.. corner.

406 - 31537

MRS. CLIFFORD SMITH,
Appellee,

v.

THE NATIONAL LIFE AND ACCIDENT
INSURANCE COMPANY, a corporation,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is a suit to recover on an insurance policy issued on the life of John Smith, for \$500, of which plaintiff, his widow, is the beneficiary. The trial was without a jury, and the court's finding and judgment were for plaintiff for that sum.

All issues were waived except the defense that the insured was not in "sound health" on the date of the issuance of the policy, which expressly provided that the company assumed no obligation "unless on said date the insured is alive and in sound health."

Dr. Traub, a physician who conducted a clinic at the Post Graduate Hospital of Chicago, testified for defendant that he treated a John Smith at that hospital from December, 1922, to March 11, 1925, up to nineteen days before the date of the policy - for aortitis, and the underlying cause of syphilis, giving the several dates of the treatments. He testified that from his experience and treating said John Smith it was his opinion that on March 30, 1925, the date of the policy, said Smith had a very serious form of heart disease on that date and for at least two years prior thereto from which he might die at any moment. His treatment of said Smith for such disease on said dates was verified by the records of the hospital, and the certificate

2451.A. 623

and - 1117

THE NATIONAL LIFE AND ACCIDENT
INSURANCE COMPANY, a corporation,
Applicant.

vs.

WILLIAM J. SMITH,
Appellee.

VERIFIED AND SUBSCRIBED TO
at Chicago, Illinois, this 1st day of May, 1922.

WILLIAM J. SMITH,
Deponent.

IN SENATE

TESTIMONY OF WILLIAM J. SMITH

IN THE CASE OF WILLIAM J. SMITH vs. THE NATIONAL LIFE AND ACCIDENT INSURANCE COMPANY

This is a report on an insurance policy issued on the life of John Smith, for \$5000, at which amount, this amount is the beneficiary. The trial was without a jury, and the court's finding and judgment were for plaintiff for that sum. All issues were raised except the defense that the insured was not in "sound health" on the date of the issuance of the policy, which expressly provided that the company assumed no obligation "unless on said date the insured is alive and in sound health."

Dr. Frank, a physician who conducted a clinic at the First National Hospital of Chicago, testified for defendant that he treated a John Smith as first hospital from December, 1921, to March 11, 1922, up to nineteen days before the date of the policy - for accident, and the underlying cause of apoplexy, giving the several dates of the treatments. He testified that from his experience and treating said John Smith it was his opinion that on March 20, 1922, the date of the policy, said Smith was a very serious case of heart disease and that he was not at least two years prior thereto from which he might die at any moment. His treatment of said Smith for such disease on said dates was verified by the records of the hospital, and the certificate

of death offered by plaintiff showed that the death of the insured resulted from myocarditis, a heart disease.

The only evidence offered by plaintiff to controvert this affirmative evidence of such condition and treatment as testified to by Dr. Traub, was her own opinion that the insured "was in perfect health" and "sound in every way" on March 30, 1925, which, in the absence of any circumstances offered in evidence upon which to base such opinion, must be deemed a mere conclusion. While in her rebuttal testimony she testified that she never heard of Dr. Traub, and undertook to say that he never treated her husband, it is manifest that her husband's attendance for treatment at the hospital by Dr. Traub, as confirmed by its records, when she was inferentially not present, may well have been without her personal knowledge or information.

But it is urged by plaintiff's counsel there was technical failure of proof as to the identity of the person so treated with the insured. We think there was sufficient evidence of identity. The certificate of death offered by plaintiff herself corresponds in descriptive particulars as to name, age, place of residence and of business, and color of insured (being a colored man), with the testimony of the doctor and the records of the hospital pertaining to the same. There was nothing to rebut these coincident circumstances tending to establish such identity. The weight of the evidence, therefore, clearly preponderates in favor of defendant's contention that John Smith, the insured, was not in sound health at the date of the policy,^a condition of obligation expressly stated therein. (Bulski v. Metropolitan Life Ins. Co., 196 Ill. App. 76, and cases there cited; Daniels Motor Sales Co. v. New York Life Ins. Co., 220 Id. 83, 86; Lewandowski v. Western & Southern Life Ins. Co., 241 Id. 55.) The words "sound health"

at least offered by plaintiff showed that the death of the

decedent resulted from hypertension, a heart disease.

The only evidence offered by plaintiff to controvert

this affirmative evidence of such condition and treatment as

testified to by Dr. Jones, was the opinion of the doctor

"that in perfect health" and "would in every way" be better.

But, again, in the absence of any circumstances tending to

show upon which to base such opinion, there is shown a mere

conclusion. This is not supported by any other evidence that

the doctor at Dr. Jones, and submitted to him that he never

visited her husband, it is admitted that the doctor's

for the purpose of the hospital by Dr. Jones, as testimony in the

records, when the case is substantially and generally, will have been

without any personal knowledge or information.

But it is urged by plaintiff's counsel that the testimony

of record as to the identity of the person so treated with

the deceased. We think there was sufficient evidence of identity.

The certificate of death offered by plaintiff bore itself contradictory

to descriptive evidence as to name, sex, place of residence

and of business, and other of deceased being a colored man, with

the testimony of the doctor and the record of the hospital

relating to the case. There was nothing to reject these statements

of deceased bearing in relation with identity. The weight of

the evidence, therefore, clearly preponderates in favor of

decedent's condition at the time death occurred, was not in

sound mind at the date of the policy, ⁵commenced at expiration

expressly stated therein. (Harris v. Metropolitan Life Ins. Co.,

100 Ill. App. 70, and cases there cited; Harris v. Metropolitan

v. New York Life Ins. Co., 230 Ill. 62; Commonwealth v. New York

a New York Life Ins. Co., 230 Ill. 62.) The words "sound mind"

mean "free from any disease or illness that tends seriously or permanently to weaken or impair the constitution." (Belvaus v. Metropolitan Life Ins. Co., 172 id. 537, 545.) That the disease of the insured was of that character is clearly inferable.

Of that fact the court seems to have entertained no doubt, and decided the case on the theory that because a copy of the application for the insurance was not endorsed on or attached to the policy, as required by the statute, (Callaghan's Ill. Stat. Ann., ch. 73, par. 375, sec. 1, subtitle 3,) it precluded the insurer from making any defense. We fail to see any such application of the statute to the only recognized issue, namely, whether the insured was in sound health at the date of the policy. Whatever application the statute might have to a defense of fraudulent representation in the application, that issue was waived and the case tried on the policy as relied on and introduced by plaintiff showing that the defendant assumed no obligation under it unless the insured was in sound health at the date of the policy. This was the recognized issue, and plaintiff was not relieved from the burden of showing compliance with a condition precedent to liability expressly stated in the policy she relied on for recovery.

As under the evidence and law plaintiff cannot recover we need not consider alleged erroneous rulings of the court on the admissibility of evidence.

REVERSED WITH FINDINGS OF FACT.

Gridley and Wells, JJ., concur.

405 - 31537

FINDINGS OF FACT.

We find that the insured was not in sound health at the time of the date of the policy sued on, but was afflicted with an incurable disease which brought on his death, and that he had been treated therefor for two years prior to his taking out said policy.

1944 - 1945

THE LIFE OF JACK

It was that the interest was not in small things

at the time of the date of the party was not, but was

attained with an economic balance which brought on his

death, and that he had been treated differently for two

years than he had been and was being.

The only remaining thing was to be done

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432 - 31564

245 I.A. 623⁴

STAR PAPER BOX COMPANY,
a corporation,
Appellee.

v.

GALLANIS BROS., Inc.,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

In this case the court struck both defendant's affidavit of merits and amended affidavit of merits, and, after refusing leave to file another, entered judgment as in case of default for \$1370.76, the amount specified by plaintiff as due for goods, wares and merchandise sold and delivered by it to defendant at the latter's special instance and request, the statement of claim giving the dates and amounts of the invoices rendered for each shipment and credits for payments made thereon. Defendant appealed.

We do not know from the record whether the court struck said affidavits for insufficiency or informality. The order does not indicate which. If the latter, the stricken pleading should have been preserved in the bill of exceptions to present the question of any error in so doing (Mann v. Brown, 263 Ill. 394); but if for the former, the motion performed the function of a demurrer at common law, and the propriety of the order striking the amended affidavit (which replaced the one previously stricken) is open to consideration. (Harmen v. Callahan, 286 Ill. 59.)

But whether for informality or insufficiency the order was

THE COURT OF CHANCERY OF THE CITY OF NEW YORK	IN SENATE JANUARY 11, 1911
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justified, - in case of the former, because of failure of the agent of defendant who swore to the affidavit to state therein, as required by the rules of court, that he had knowledge of the facts; in case of the latter, for failure to state facts constituting a defense.

The cause of action was predicated on the furnishing of goods on specific dates at specific prices on defendant's request, and also on a stated account. While there was a denial of a stated account, it did not preclude taking judgment on the other undenied ground of action. The only attempt to state a defense to the latter was the averment that "defendant ordered from plaintiff various shipments of candy boxes to be delivered at certain specified times," without specifying what times, or that defendant ordered the boxes for any particular time or times. The affidavit of merits then proceeds to state argumentatively that time was the essence of the contract (without stating the contract) "because the boxes could only appropriately be used for certain occasions, and should have been delivered in time for trade on Valentine's day and Easter" (of what year or time of the year is not stated), although it appears from the dates of some of the invoices and of the credits that both deliveries and payments on the account were made long after those dates of celebration.

The affidavit of merits set up no facts from which it might be inferred that the deliveries "should" have been made before they were made.

It further set up an alleged agreement for adjustment between the parties through "a certain salesman" for plaintiff without alleging he had any authority to make it which could not be inferred from his mere authority to sell. The pleading

...in case of the former, because of failure of the agent of defendant who were to the affidavit to state therein as required by the rules of court, that he had knowledge of the facts in case of the latter, the failure to state facts constituting a defense.

The cause of action was predicated on the furnishing of goods on specific dates of specific prices on defendant's request, and also on a stated account. While there was a denial of a stated account, it did not preclude taking judgment on the other unadmitted ground of action. The only attempt to state a defense to the latter was the statement that "defendant admitted that plaintiff's various shipments of goods were as delivered at certain specified times," without specifying what times, or that defendant ordered the goods for any particular time or time. The affidavit of motion then proceeded to state argumentatively that time was the essence of the contract (without stating the contract) "because the goods could only approximately be used for certain occasions, and should have been delivered in time for time on Valentine's day and Easter" (of what year or time of the year is not stated), although it appears from the dates of some of the invoices and of the credits that both deliveries and payments on the account were made long after those dates of delivery.

The affidavit of motion set up no facts from which it might be inferred that the deliveries "should" have been made before they were made.

If further set up an alleged agreement for adjustment between the parties through "a certain salesman" for plaintiff without alleging he had any authority to make it which could not be inferred from his mere authority to sell. The pleading

being evasive, argumentative, and setting up no facts constituting a defense it was properly stricken.

Judgment, too, was properly taken as by default under the rule of court which provides for entering the same on plaintiff's affidavit of claim if defendant fails to file such an affidavit of merits as is required by the rules of court, which require a statement of the ultimate facts constituting the defense and that the pleader must not deny allegations of fact evasively but answer the points in substance. On non-compliance with these requirements, as above stated, judgment as by default was justified on plaintiff's sworn statement of claim showing a specific amount due on a performed contract or contracts.

Defendant on entering appearance filed its demand for a jury. Had it properly taken issue on the facts it would have been entitled thereto. But having failed to do so, it was not entitled to a jury for the assessment of damages alleged to be liquidated. (Mann v. Brown, supra.)

The denial of defendant's request to file a third affidavit of merits constituted no abuse of discretion. There is nothing in the record to indicate that defendant had any other defense to present than that already attempted in the two stricken affidavits, which were practically the same in form and substance. In such circumstances the request savored of mere dilatory tactics.

The judgment is affirmed.

AFFIRMED.

Gridley and Wells, JJ., concur.

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— 22 —

JULIUS F. WALL and
BLANCHE E. WALL, his wife,
Appellees,

v.

LYDIA S. HIBBARD et al.,

On appeal of LYDIA S. HIBBARD,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

Complainants, husband and wife, filed their bill of complaint June 30, 1923, to set aside the forfeiture of a contract for a deed to real estate entered into between them and defendant Hibbard, September 23, 1922, to reinstate their rights under the contract, and to restore their possession of the land, and for general relief.

The contract provides for monthly payments of \$200 each on the first of each month (beginning, as agreed, on November 1, 1922), with interest on the unpaid principal, having the usual forfeiture clause, and making time the essence of the contract, and appointing defendant Beck attorney in fact and authorizing him in case of default in said payments to execute a cancellation of the contract and a sufficient deed of the title of the Walls to said Hibbard.

No question arises as to complainants' compliance with the contract until after May 1, 1923, up to which time all payments required under the contract had been made.

The bill alleges that the parties agreed that the monthly installment due May 1, was to be paid later in the month,

1881 A. 681

1881 - 1882

APPEAL FROM
SUNSHINE COURT,
COOK COUNTY.

LESLIE S. HIRSH & CO.,
Plaintiffs,
vs.
JULIUS F. WALL and
STANLEY W. WALL, his wife,
Defendants.

MR. JUDICIAL JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Complainants, husband and wife, filed their bill of complaint June 20, 1923, to set aside the forfeiture of a contract for a deed to real estate entered into between them and defendant Hibbard, September 25, 1922, to reinstate their rights under the contract, and to restore their possession of the land, and for general relief.

The contract provides for monthly payments of \$200 each on the first of each month (beginning, as agreed, on November 1, 1922), with interest on the unpaid principal, having the usual forfeiture clause, and making time the essence of the contract, and appointing defendant Beck attorney in fact and authorizing him in case of default in said payments to execute a condemnation of the contract and a judgment deed of the title of the bill to said Hibbard.

No question arises as to complainants' compliance with the contract until after May 1, 1923, up to which time all payments required under the contract had been made.

The bill alleges that the parties agreed that the monthly installment due May 1, was to be paid later in the month.

and alleged tender thereof. Defendants' joint answer denied that any such change was made and claimed that defendants abandoned the premises and voluntarily surrendered possession of the same and denied tender. Defendant Hibbard filed a crossbill asking for ratification of the quitclaim deed from defendant Beck, pursuant to said power of attorney, and that the contract be declared null and void and a cloud upon her title, and that the title be quieted, etc.

The decree appealed from is at variance with the facts, equities and relief as found and recommended by the master. There is a sharp controversy as to the facts. But upon close analysis we think the chancellor's findings should be sustained and that they are in accord with apparent equities.

While it is urged that there were several witnesses for defendants as against mainly uncorroborated testimony of complainant Julius Wall, their manifest interest in having the property, which had apparently appreciated in value in the meantime, restored to defendant to whom they were related either by blood or marriage, might well have been considered as weakening the probative value of their testimony, especially in view of the improbability of those features of it pertaining to complainants' alleged abandonment of the contract and voluntary surrender of the premises.

On the premises was a two-story building. Possession was surrendered to complainants on entry into the contract, appellant leaving some furniture therein on storage. Julius Wall is a florist. He and his wife occupied the lower floor and rented out the upper floor to roomers. She left him about May 13. Mother's day that year occurred May 13, and needing his money for that occasion, he testified that he so informed Mrs. Hibbard and she said she would wait for it till after that time. While she denied his testimony in this respect it was corroborated by his

and alleged to have been the same. The defendant, John Brown, testified that
any such thing was not done and claimed that the defendant was the
person who voluntarily surrendered possession of the same and
denied further. The defendant testified that a receipt was given for
the possession of the defendant from the defendant's house, but that he
said power of attorney, and that the contract he desired will and
void and a claim upon her title, and that the title he wanted, etc.
The contract appeared from it as variance with the facts.
evidence and relied on former and recommended by the master. There
is a sharp controversy as to the facts. But upon close analysis we
think the chancellor's findings should be sustained and that they
are in accord with apparent evidence.
While it is urged that there were several witnesses for
defendant as against mainly corroborated testimony of complainant
James Bell, their material interest in having the property, which
had apparently appeared in value in the meantime, rendered so
defendant so when they were raised either by blood or marriage,
might well have been considered as weakening the probative value
of their testimony, especially in view of the improbability of
their failure of it pertaining to complainant, alleged abandonment
of the father and voluntary surrender of the premises.
On the premises was a two-story building. Possession
was returned to complainant on entry into the house.
Appellant leaving some furniture therein on storage. James Bell
is a living. He and his wife occupied the lower floor and rented
out the upper floor to roomers. She left him about May 12.
Mother's day that year occurred May 12, and seeing his money for
that occasion, he testified that he so informed Mrs. M. and
she said she would wait for it till after that time. While she
denied his testimony in this regard it was corroborated by his

brother-in-law who was present at the interview.

His version of subsequent events was substantially as follows: That on May 15 he went to appellant to make the May payment and she refused to accept it, referring him to her attorney, defendant Beck; that Beck also refused to take it, telling him to come back in a few days; that he went back on the 18th with a check for the payment but Beck told him he did not know what Mrs. Hibbard was going to do and to come back a few days later; that on the 22nd Mrs. Hibbard asked for, and he gave her keys "to get some of her stuff out of the attic"; that up to that time, and on that night, he remained on the first floor, but returning there on the next day he found a new lock on the door and was unable to enter, and no one answering his knocks, he went to bed on the second floor; that on the 23rd, Mrs. Hibbard refusing him admittance to the lower apartment, he went to see Beck who told him that she "was going to foreclose on him," and asked him if he had not received a letter; that on the 24th or 25th he found a letter at his store dated the 24th, from Beck, notifying him that he had on that date, on the affidavit of Mrs. Hibbard, cancelled the contract; that he again went to see her and she told him that she was going to keep the house; that he then found a lock had also been placed on the door to the upper rooms, which the tenants vacated on her notice at the end of the month, and his goods placed in the basement and some in the alley, and in June he received notice from a storage house (that had been sent to Mrs. Hibbard and readdressed to him) that his furniture had been put there in storage. He offered the May installment again on May 30, and in June tendered money for the two months, which was refused, and then filed the bill herein.

Complainants paid on the contract towards principal and

brother-in-law who was present at the interview.

His version of subsequent events was substantially as follows:

That on May 15 he went to appellant to make the May

payment and she refused to accept it, refusing him to pay

thereafter, defendant Hook; that Hook also refused to pay it.

Telling him to come back in a few days; that he went back on the

18th with a check for the payment but Hook told him he did not

know what Mrs. Hibbard was going to do and he came back a few

days later; that on the 22nd Mrs. Hibbard asked for, and he gave

her keys "to get some of her stuff out of the attic"; that up to

that time, and on that night, he remained on the first floor, and

returning there on the next day he found a new lock on the door

and was unable to enter, and on answering his knock, he went

to bed on the second floor; that on the 23rd, Mrs. Hibbard refusing

him entrance to the first apartment, he went to see her and told

him that she "was going to turn loose on him," and asked him if he

had not received a letter; that on the 24th or 25th he found a letter

at his store dated the 24th, from Hook, notifying him that he had on

that date, on the affidavit of Mrs. Hibbard, cancelled the mortgage;

that he again went to see her and she told him that she was going

to keep the house; that he then found a lock had also been placed

on the door to the upper rooms, which the female resided on her

notice at the end of the month, and his goods placed in the house-

ment and some in the alley, and in June he received notice from a

strange person (that had been sent to Mrs. Hibbard and recommended

to him) that his furniture had been put there in storage, so

entered the May installment again on May 30, and in June tendered

money for the two months, which was refused, and then filed the

bill herein.

Defendant's wife on the contrary swears positively and

interest \$4,210.21, and in the adjustment of interest on a first mortgage and of insurance and payment of water bills and general taxes for 1922, \$537.09 additional, making a total on account of purchase of the property of \$4,797.30.

The version given by defendants' witnesses of the conferences and interviews with Julius Wall is materially different in most respects. Mrs. Hibbard's son, Lewis, who represented her in some of these interviews, testified that he called Wall on the telephone May 11th, reminding him that he had not paid the May installment and that Wall said that he would pay right after Mother's day, and that he told him that he "better hurry up." But not receiving a check the day after Mother's day he advised Beck of the fact and asked him to write a letter to Wall asking for the payment, and saw Wall with reference thereto on May 18, when Wall and his brother-in-law called on him; that Wall then said that his wife had left him and spent all of his money and he wanted to make a new contract, leaving his wife out of it; that Mrs. Hibbard said that could not be done; that later he said he had the money but would not continue payments of which his wife would get half; that he saw Wall on the night of May 25, after his mother had taken possession of the house and had moved her furniture from the attic when a lock was put on the inside door; that Wall said he would come the next night with a truck and get his things in the basement and did not know what to do with the things upstairs after the tenants left; that he afterwards came and left a truck in the alley, and Lewis and his brother helped to move the furniture out of the basement and load it on the truck; and about ten days later sent Wall's furniture and things on the second floor to a warehouse for storage; that on May 30, Wall again tendered his mother the "rent money," which his mother refused to receive.

interest \$2,500.00, and in the adjustment of interest on a time mortgage and of insurance and payment of water bills and general taxes for 1922, \$387.00 additional, making a total on account of purchase of the property of \$4,787.00.

The version given by defendant, witnesses of the defendant and interviews with Julius Wall is substantially different in most respects. Mrs. Hibbard's son, Lewis, who represented her in some of these interviews, testified that he called Wall on the telephone May 15th, reminding him that he had not paid the May installment and that Wall said that he would pay right after Mother's day, and that he told him that he "couldn't pay up." But not receiving a check the day after Mother's day he advised both of the facts and asked him to write a letter to Wall asking for the payment, and saw Wall with various checks on May 18, when Wall and his brother-in-law called on him; that Wall then said that his wife had told him and spent \$100 of his money and he wanted to make a new contract, leaving his wife out of it; that Mrs. Hibbard said that would not be done; that later he said he had the money but would not advance payments at which his wife would get angry that he was Wall on the night of May 20, after his mother had asked possession of the house and had moved her furniture from the attic when a lock was put on the inside door; that Wall said he would come the next night with a friend and get his things in the basement and did not know what to do with the things; that after the tenant left; that he afterwards came and left a friend in the attic, and Lewis and his brother helped to move the furniture out of the basement and load it on the truck and about ten days later saw Wall's furniture and things on the second floor as a warehouse for storage; that on May 20, Wall again contacted his mother the "rent money," which his mother refused to receive.

Mrs. Wall, who corroborated in the main the testimony of her son Lewis, made the affidavit May 23rd on which Beck acted and executed to her in the name of the Walls a quitclaim deed to the premises, which she received on the 24th. She testified that Wall, on May 25th, handed her the key and said he was giving up the property, and that she handed him one to the front door because he said he wanted to get in and get something.

Defendant Beck denied much of the interviews with him as testified to by Wall, and said that both on the 28th and on the 31st of May, and the 5th of June, Wall saw him and said that he thought he ought to have some of the money paid back to him; that he told Wall there was no use to talk about that but that if he paid up the balance on the contract he would see that he got a deed to the property, and that Wall said that he would spend no more money where his wife was going to get the benefit of it, but would make a payment if Mrs. Hibbard would give him a contract personally, and that when he came into the office he had money in his hand, and a check but did not count out the money.

It appears that Wall showed the premises to a prospective tenant of the second floor and basement about May 24th, and executed a lease to her on May 26th, as she testified, but that Mrs. Hibbard would not give her possession.

Wall denied that he asked for a new contract leaving his wife out of it.

The evidence is irreconcilable and we need not detail it at further length.

The decree finds that the material allegations of the bill were proven and the equities were with complainants, and dismissed the crossbill for want of equity. It finds that immediately after May 13, Julius Wall tendered Mrs. Hibbard the

Mr. Wall, who corroborated in the main the testimony of her son Lewis, made the affidavit May 19th on which Book noted and suggested to her in the name of the Wall a statement made to the promises, which she received on the 24th. She testified that Wall, on May 28th, handed her the key and said he was giving up the property, and that she handed him one to the front door because he said he wanted to get in and get something.

Defendant Book denied much of the interview with him as testified to by Wall, and said that both on the 28th and on the 31st of May, and the 31st of June, Wall saw him and said that he should be ought to have some of the money paid back to him; that he said Wall there was no use to talk about that but that if he paid up the balance on the contract he would see that he got a deed to the property, and that Wall said that he would spend no more money where his wife was going to get the benefit of it, but would make a payment if Mrs. Hubbard would give him a contract personally, and that when he came into the office he had money in his hand, and a check but did not cash out the money.

It appears that Wall showed the promises to a prospective tenant of the second floor and basement about May 28th, and executed a lease to her on May 28th, as she testified, but that Mrs. Hubbard would not give her possession.

Wall denied that he asked for a new contract leaving his wife out of it.

The evidence is irreconcilable and we need not state it at further length.

The doctor finds that the material allegations of the bill were proven and the evidence was with complainant, and dismissed the complaint for want of equity. It finds that immediately after May 12, William Wall tendered Mrs. Hubbard the

May installment and interest and that she refused to receive the same, and that at other times prior to the filing of the bill complainants tendered her all sums due on the contract and that the tenders were refused. The decree further finds that Blanche Wall paid out of her own money the sum of \$1,000 on the contract, and that neither of the complainants voluntarily surrendered possession of the premises, nor gave up their interests in the contract.

The decree further finds that no definite, reasonable and specific notice was ever given complainants by Mrs. Hibbard of her intention to forfeit the contract and regain possession of the premises, and that it would be against equity and good conscience to deny complainants the right to reinstate said contract and again take possession of the premises. The decree grants the relief prayed for in the bill and that complainants shall have the right to possession of the premises when they shall have paid Mrs. Hibbard what may be found due under the contract within fifteen days after approval of a stated account as therein provided for.

After reviewing the evidence we think it clearly shows, even by testimony offered in appellant's behalf, that there was an indulgence given to complainants to pay the May installment after Mother's day and thus a temporary suspension of the right to declare a forfeiture. Whether or not there was any tender made on or before the 18th, as claimed by Wall, the indulgence thus given indicated that defendants did not intend to insist upon an immediate performance of the contract according to its terms, or to declare a forfeiture for failure to make the payment, and that defendants treated the time clause as waived or suspended at least up to the time of the execution of said affidavit and quitclaim deed.

It was said in Eaton v. Schneider, 185 Ill. 508, that:

Key installment and interest and that she refused to receive the same, and that at other times prior to the filing of the bill complaints furnished her all came due on the contract and that the bonds were returned. The bonds further claim that Blanche will pay out of her own money the sum of \$1,000 on the contract, and that neither of the complainants voluntarily relinquished possession of the premises, but gave up their interests in the contract.

The bonds further claim that on October, 1900, and specific notice was ever given complainants by Mrs. Richard of her intention to forfeit the contract and regain possession of the premises, and that it would be against equity and good conscience to then complainants the right to rescind said contract and again take possession of the premises. The bonds further claim that they paid for in the bill and that complainants shall have the right to possession of the premises when they shall have paid Mrs. Richard what may be found due under the contract within fifteen days after payment of a stated amount as therein provided for.

After reviewing the evidence we think it clearly shown, even by testimony offered in complainant's behalf, that there was an indulgence given to complainants to pay the Key installment after maturity day and that a temporary suspension of the right to declare a forfeiture. Further to say there was any further acts on the part of the bond, as claimed by bill, and indulgence then given indicated that defendants did not intend to insist upon an immediate performance of the contract according to its terms, or to declare a forfeiture for failure to make the payment, and that defendants intended the time should be waived or suspended as to the time of the execution of such affidavits and certain deed.

It was said in Blanch v. Blanche, 188 Ill. 505, 506, that

"Where time is stated to be of the essence of a contract to convey land, if both parties, by a mutual course of conduct, treat the time clause as waived or suspended, one of them cannot suddenly insist upon forfeiture, but must, in order to then avail himself of the time clause, give reasonable, definite and specific notice of his changed intention." (Citing Menson v. Bragdon, 159 Ill. 61, and Watson v. White, 152 Ill. 364.) It was also said in Plummer v. Worthington et al., 321 Ill. 450, that a demand for payment of a sum which is past due is inconsistent with a declaration of forfeiture and indicates rather an intention to waive forfeiture. Here it appears that a demand was made for payment not only verbally by Lewis Hibbard on May 11, and further indulgence was then given, but in writing by Beck on the 17th and 19th of May. While, as said in the latter case, a waiver of the time of payment was not a permanent waiver of the right to declare a forfeiture but only a temporary suspension of the right, such right could not be exercised after such waiver without previously giving defendants a specific notice of the intention to declare a forfeiture. No such notice was given in this case. On the contrary, it is merely claimed that Julius Wall was told if he did not make the payment the contract would have to be terminated. There was nothing definite or specific about it. There is no contention that any notice was given to his wife, his co-tenant, who was a party to the contract and had paid \$1000 on the purchase price and was equally entitled to notice.

It was said in Evans v. Gerry, 174 Ill. 595, that where an arrangement or waiver is relied upon, it must be shown to have been the clear intention of the parties to abandon the contract previously entered into, and that courts will not infer waiver or abandonment on slight proof. While the evidence is conflicting

abandonment per letter
5-28-17

...there is a duty to be of the essence of a contract to ...
...very much. At both parties, by a mutual contract of contract, there
...the time clause as to the time of payment, and of the time of payment
...local upon the parties, but must, in order to be valid, be made
...of the time clause, give reasonable, definite and specific notice
...of his changed intention." (Citing Wheeler v. Wheeler, 150 Ill.
...41, and Wheeler v. Wheeler, 150 Ill. 404.) It was also said in
...Wheeler v. Wheeler, 150 Ill. 404, that a demand for
...payment of a sum which is due is inconsistent with a declaration
...of intention and intention to make an intention to make a contract
...that it appears that a demand was made for payment and only verbally
...of Lewis H. Wheeler on May 11, and further intention was then given
...but in writing by him on the 17th and 18th of May. While, as
...said in the latter case, a notice of the time of payment was not
...a permanent notice of the right to declare a contract but only
...a temporary suspension of the right, such right could not be
...terminated after such waiver without previously giving adequate
...a specific notice of the intention to declare a contract. No
...such notice was given in this case. On the contrary, it is merely
...claimed that Julius Hall was told it he did not make the payment
...the contract would have to be terminated. There was nothing
...definite or specific about it. There is no contention that any
...notice was given to his wife, his co-tenant, who was a party to
...the contract and had paid \$1000 on the purchase price and was
...verbally notified to notice.
...It was said in Wheeler v. Wheeler, 150 Ill. 404, that where
...an agreement or notice is relied upon, it must be shown to have
...been the clear intention of the parties to abandon the contract
...permanently entered into, and that equity will not take notice
...or abandonment on slight proof. While the evidence is conflicting

on the question of abandonment, we think that there are circumstances that refute the contention of abandonment. Julius Wall's assertion of his right to execute a lease for the upper floor, after receiving notice of the cancellation of the contract, and his attempt to assert his rights under the contract after Mrs. Hibbard regained possession of the premises are not consistent with a voluntary surrender of the premises and assent to the cancellation of the contract without seeking a return, of a portion at least, of the money he had paid upon it. One in his circumstances would not so readily part with over \$5,000 of money. It may be true that one placed at the disadvantage of being dispossessed of the premises by a method which smacks of trickery, if his testimony is to be believed, and having then recognized the purpose to foreclose his rights under the contract, would naturally attempt to effect a compromise and seek the return of part of his money, as testified to by Beck. But that one would under the circumstances voluntarily surrender and readily assent to a foreclosure of all his rights without first attempting to effect some such compromise is highly improbable.

However, he had no power to release the rights of his wife. They were co-tenants in common of an equitable estate. They "had equal rights under the contract of purchase and either of them had a right to pay all the installments remaining unpaid and thereby secure the title for the benefit of himself and his co-tenant." (Mahler v. Staack, 311 Ill. 490, 492; Vol. 38 Cyc. pp. 101-104.)

But as is said in 13 Corpus Juris, 688: "Equity will refuse to enforce an express provision making time the essence of a contract, when to do so would be unconscionable." The purchase price of the property was \$16,000. About one-quarter

on the question of abandonment, we think that there are strong reasons that justify the retention of abandonment. Indeed, while retention of his right to recover a loan for the money loaned, after receiving notice of the cancellation of the contract, and his attempt to enforce his rights under the contract after that. His right remained possession of the premises and was consistent with a voluntary surrender of the premises and amount to the cancellation of the contract without a return of a portion of loan, of the money, he had paid upon it. And in this circumstance would not be readily paid with over \$10,000 of money. It may be said that one placed in the disadvantage of being the possessor of the premises by a contract which amount of delivery. It was necessary to be delivered, and having been delivered, the purpose to foreclose his rights under the contract, would naturally attempt to effect a compromise and seek the return of part of his money, as foreclosed by the bank. But that one would meet the circumstances voluntarily surrender and readily amount to a foreclosure of all his rights without first attempting to effect some such compromise in highly impracticable. However, he had no power to release the right of his wife. They were co-defendants in common of an equitable estate. They had equal rights under the contract of purchase and either of them had a right to pay all the installments remaining unpaid and thereby secure the title for the benefit of himself and his co-defendant. (See Wright v. Wright, 211 Ill. 400, 401; Vol. 30, 31, pp. 101-102.) But as in case in 13 Equity Series, 400: "Equity will refuse to enforce an express provision making time the essence of a contract, when to do so would be unconscionable." The purchase price of the property was \$10,000. About one-quarter

of it had been paid, and more than one-third on the equity above the \$5,000 mortgage on the property. The forfeiture was declared for the non-payment of only \$234. It is clearly inferable, we think, that Wall offered to pay appellant money, not only for the May but also for the June installment. It is conceded that the payment of the installment was a condition subsequent. As said in Bouglan v. Union Mutual Life Ins. Co., 127 Ill. 101-116: "No rule is better settled than that a court of equity will not lend its aid to enforce a forfeiture because of a breach of a condition subsequent in a deed," and that it makes no difference in such a case that the aid of equity is sought upon the special ground of removing a cloud on the title.

In Watson v. White, 152 Ill. 364, the court said what may be aptly said in the present case: "We concur in the conclusion of the chancellor below that the forfeiture and notice of forfeiture were void and of no effect. That conclusion, under the circumstances of the case is just and right and equitable. Forfeiture is a harsh remedy at best, and is by no means a favorite with a court of chancery under any circumstances, and readily yields in that forum, to the principle of compensation if fair dealing and good conscience seem so to demand." Again it was said in Springfield etc. Trac. Co. v. Farrick, 249 Ill. 470; "Where the compensation can be made in money, courts of equity will relieve against forfeitures and compel the party to accept reasonable compensation in money. (Citing cases.) * * * Where there can be a clear estimate of damages or just compensation for breaches of conditions or covenants, courts of equity will relieve against forfeitures or penalties and require such compensation to be made." (p. 476.) In the instant case the decree requires an accounting to be had to determine the amount of compensation and that it

of it had been paid, and were then due-claim on the equity above
the \$2,000 mortgage on the property. The defendant had claimed
for the non-payment of only \$200. It is clearly established, we
think, that Wall offered to pay appellant money, not only for the
debt but also for the loan installment. It is contended that the
payment of the installment was a condition precedent. In this
case, Wall v. Wall, 111 Ill. 101-102.
The court is of the opinion that a contract of equity will not
bind its aid to enforce a mortgage because of a breach of a
condition precedent in a deed, and that it makes no difference
in such a case what the aid of equity is sought upon the ground
of removing a cloud on the title.
In Wall v. Wall, 111 Ill. 101-102, the court said that
may be applied in the present case. The court in the case
of the mortgagee holds that the mortgagee and holder
of the mortgage were held out of no effect. That conclusion, under
the circumstances of this case is just and right and equitable.
The mortgage is a personal security, and is by no means a mortgage
with a contract of equity, which may be enforced, and readily
yield in this forum to the principle of compensation it fair
debt and good conscience seem to demand. Again it was said
in Wall v. Wall, 111 Ill. 101-102, "where the
compensation can be made in money, courts of equity will relieve
against forfeiture and compel the party to accept reasonable
compensation in money." (Citing cases.) * * * There have been
to a direct estimate of damages or just compensation for breach
of conditions or covenants, courts of equity will relieve against
forfeiture or penalties and require such compensation to be made."
(p. 478.) In the instant case the decree requires an accounting
so as to determine the amount of compensation and that it

shall be paid within fifteen days after approval of the account.

We think the equities of the case are with complainants as found in said decree and therefore it is affirmed.

AFFIRMED.

Gridley and Wells, JJ., concur.

It is noted in said document that the same is not to be used for the purpose of the same.

4450

... ..

W. C. HANDLEY,
Defendant in Error,

v.

JOSEPH F. RYAN and
CONANT W. RUTH et al.,
Defendants.

CONANT W. RUTH,
Plaintiff in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

In this action default was taken against Ruth for want of appearance after service, and judgment was entered on the affidavit of claim stating that there was due and owing plaintiff from said Ruth upon a contract the sum of \$2500.

The declaration is in two counts. Plaintiff in error contends that neither of them states a cause of action. Defendant contends that each count is good as a count (1) in indebitatus assumpsit for money loaned, and (2) as a separate cause of action on the notes mentioned therein, admitting, however, that the counts do not comply with the requirements of common law pleading, but insisting that they will be presumed regular because Ruth made no appearance. If they state no cause of action as to Ruth a judgment thereon against him could not stand whether he entered appearance or not. The sufficiency of the declaration must be tested by its allegations and not by any presumption they do not warrant.

But we fail to see that a cause of action is stated against Ruth, whether against the other defendants or not.

2451.A.684

22 - 21000

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

F. C. HARRIS,
Defendant in Error,
v.
LEONARD F. HYMAN and
JOSEPH F. HYMAN et al.,
Plaintiffs.

CONVICT W. WHITE,
Defendant in Error.

MR. PRESIDENTING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

In this action default was taken against White for want
of appearance after service, and judgment was entered on the
affidavit of claim stating that there was due and owing plaintiff
from said debt upon a contract the sum of \$3500.
The declaration is in two counts. Plaintiff in error
contends that neither of them states a cause of action. Defendant
contends that each count is good as a count (1) in itself
and (2) as a separate cause of action
on the notes mentioned therein, admitting, however, that the counts
do not comply with the requirements of common law pleading, but
insisting that they will be pronounced regular because each made no
appearance. It says that no cause of action as to both a
judgment thereon against him could not stand whether he entered
appearance or not. The sufficiency of the declaration must be
tested by its allegations and not by any prescription they do not
warrant.
But we fail to see that a cause of action is stated
against both, whether against the other defendants or not.

With them we are not concerned.

The first count states that defendants (including Ruth) entered into two certain agreements, copies of which are attached to and made a part of the declaration and marked as plaintiff's exhibits A and B. This is not in accordance with common law pleading in actions at law in which the causes of action must be found within the express allegations of the declarations and not by reference to exhibits or attached papers. They form no part of the pleading.

The declaration, however, proceeds to say that in consideration that plaintiff would loan certain moneys to defendants they promised to pay the moneys so advanced "in accordance with the terms of said contracts," and that pursuant thereto plaintiff took as evidence four promissory notes (described only as to their amounts, dates and time of payment), and then ends: "Yet defendants have not paid the amount of said several notes or either of them or any part thereof, but refused to do so, to the damage of the plaintiff in the sum of \$2500, wherefore plaintiff brings his suit."

The second count differs from the first in stating that plaintiff entered into a written contract with one of the defendants, Joseph Ryan, and sets forth the contract in haec verba, which is to the effect that Handley loaned money to Ryan for certain specified purposes therein mentioned, and Ryan was to pay Handley moneys received from certain marketed goods until the money loaned was paid with interest. It is further alleged in said count that said contract was "approved and agreed to" by the other defendants by a signed document which is also set forth in haec verba. The latter averment, however, is a mere conclusion inconsistent with the contract itself as set forth, which merely provides that the "undersigned" - naming the defendants, - "approve of the above

With them we are not concerned.

The first count states that defendants (including Ryan) entered into two certain agreements, copies of which are attached to and made a part of the declaration and marked as plaintiff's exhibits A and B. This is not in accordance with common law placing in evidence of law in which the cause of action must be found within the express allegations of the declaration and not by reference to exhibits or attached papers. They form no part of the pleading.

The declaration, however, proceeds to say that in consideration that plaintiff would loan certain money to defendants they promised to pay the money as advanced "in accordance with the terms of said contracts," and that pursuant thereto plaintiff took as evidence four promissory notes (described only as to their amount, date and time of payment), and then says: "Yet defendants have not paid the amount of said several notes or either of them or any part thereof, but refused to do so, to the damage of the plaintiff in the sum of \$2500, wherefore plaintiff brings his suit."

The second count differs from the first in stating that plaintiff entered into a written contract with one of the defendants, Joseph Ryan, and sets forth the contract in great length, which is to the effect that Hendley loaned money to Ryan for certain specified purposes therein mentioned, and Ryan was to pay Hendley money received from certain marketed goods until the money loaned was paid with interest. It is further alleged in said count that said contract was "approved and agreed to" by the other defendants by a signed document which is also set forth in great length. The latter statement, however, is a mere conclusion inconsistent with the contract itself as set forth, which merely provides that the "undersigned" - naming the defendants, - "approve of the above

contract and consent that said factory at No. 1714 So. Ashland avenue be used for the purposes of carrying out the provisions of said contract." While Ruth is one of the signers of the latter document there is nothing in its phraseology that legally obligates the signers, individually or collectively, to pay plaintiff the money loaned to Ryan. They merely approved of the contract with Ryan without guaranteeing performance thereof or obligating themselves to carry it out, and consented to the use of certain property for the purposes of the contract with Ryan.

The count then sets up a power of attorney conferring power on Ryan to sign notes to carry out the contract between him and Handley. But said power of attorney is not signed by Ruth, and the count proceeds to state that "pursuant to said contract and power of attorney above set forth, the defendant Joseph F. Ryan, in consideration of the advancement of certain moneys to the defendants executed its four certain promissory judgment notes," described as in the first count, and ends with the allegation that defendants promised to pay said promissory notes, and though requested have not paid them, to the damage, etc., "wherefore plaintiff brings his suit."

We think it is plain that both counts undertake to declare on the notes. The first count does not allege that Ruth executed or delivered the notes in question, and the second count affirmatively states that they were signed by Ryan under a power of attorney that did not purport to be executed by Ruth. They do not, therefore, state a cause of action against Ruth and for that reason no judgment thereon against him can stand.

REVERSED.

Gridley and Wells, JJ., concur.

contract and account that said contract is No. 1414 No. 1414

contract be used for the purpose of carrying out the provisions

of said contract. While said is one of the signs of the

contract account there is nothing in the contract that legally

obligates the signers, individually or collectively, to pay

liability the money loaned to them. They merely approved of the

contract with them without guaranteeing performance thereof or

obligating themselves to repay it and, and connected to the use

of certain property for the purpose of the contract with them.

The account then sets up a power of attorney constituting

power on them to sign notes to repay and the contract between him

and himself. But said power of attorney is not signed by him.

and the account proceeds to state that "thereafter to said contract"

and power of attorney above and within the defendant Joseph W. Ryan

in consideration of the advancement of certain moneys to the

defendant executed the four certain promissory "payment notes".

contained on in the first count, and each with the allegation that

defendant promised to pay said promissory notes, and thereby

requested have not paid them, to the damage, etc., "wherefore

plaintiff prays his writ."

We think it is plain that both counts undertake to describe

on the notes. The first count then sets forth that said contract

or delivered the notes in question, and the second count affirmatively

states that they were signed by them under a power of attorney that

did not purport to be executed by him. They do not, therefore,

state a cause of action against him and for that reason no judgment

thereon against him can stand.

REVEREND.

Stacy and Kelly, Jr., counsel.

Respectfully - before the Honorable

33 - 31624

WILLIAM MOSHINSKY,
Defendant in Error,

v.

BERTHA HAVIAR, JOHN HAVIAR,
CHICAGO TITLE & TRUST COMPANY
and THOMAS H. MULLAY,
Plaintiffs in Error.

} ERROR TO

} SUPERIOR COURT,

} COOK COUNTY.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

William Moshinsky filed a bill against Bertha and John Haviar, praying for the specific performance of a contract of sale entered into between them, whereby the Haviars agreed to sell to Moshinsky certain real estate.

The contract provided, among other things, that should the purchaser fail to perform his part of the contract, the earnest money of \$400 might at the option of the vendor be retained as liquidated damages, and that the contract and earnest money should be held by the Chicago Title & Trust Company for the mutual benefit of the parties, to be applied by it, if retained, to the payment, first, of expenses incurred for the vendor, and second, to the payment of a commission to the vendor's broker, Thomas H. Mullay. The bill alleged that a copy of the contract had been recorded in the recorder's office, and that the original contract and earnest money had been deposited in escrow with the Chicago Title & Trust Company.

Subsequently an amended bill of complaint was filed setting up substantially the same facts, and praying for the same relief, to which the defendants filed answers and issue was joined. Bertha Haviar set up in her answer that she signed the

WILLIAM HENNING, Plaintiff,
vs.
JOHN HAYES, Defendant.
Chicago Title & Trust Company,
and THOMAS E. HULLY, Defendants in Error.

THE CAUSE OF THE SUIT.

William Henning filed a bill against John Hayes and John Hayes, praying for the specific performance of a contract of sale entered into between them, whereby the Hayes agreed to sell to Henning certain real estate. The contract provided, among other things, that should the purchaser fail to perform his part of the contract, the earnest money of \$400 might at the option of the vendor be retained as liquidated damages, and that the contract and earnest money should be held by the Chicago Title & Trust Company for the mutual benefit of the parties, to be applied by it, if required, to the payment, first, of expenses incurred for the vendor, and second, to the payment of a commission to the vendor's broker, Thomas E. Hully. The bill alleged that a copy of the contract had been recorded in the recorder's office, and that the original contract and earnest money had been deposited in escrow with the Chicago Title & Trust Company.

Subsequently an amended bill of complaint was filed setting up substantially the same facts, and praying for the same relief, so that the defendant's filed answers and issue was joined. Before Hayes set up in her answer that she signed the

contract under duress from her husband who was intoxicated at the time, and alleged subsequently the same facts in a cross bill further alleging that complainant, acting through his agent Mullay, induced her husband to sign the contract, knowing of his intoxicated condition, and at the same time caused her husband to force her by threats, etc., to sign said contract. John Haviar set up in his answer substantially the same facts that he was induced by Mullay to sign the contract while he was in a drunken condition and had no knowledge or understanding of what he was doing, and also filed a cross bill predicated on substantially the same allegations. The cross bills sought to have the contract declared null and void, and removed as a cloud upon the title of the property. Issue was taken on the allegations set up in the cross bills by Moshinsky's answers thereto.

Some months later Moshinsky filed a petition for leave to file a supplemental bill against the Chicago Title & Trust Company and Thomas H. Mullay, and on leave being given the bill was filed and said parties summoned as new parties defendant.

The supplemental bill, so-called, set forth the facts as to the filing of the original bill for the purpose of obtaining specific performance of said contract, and of the filing of said answers and cross bill of Bertha Haviar, and that rather than engage in protracted litigation the parties to the original bill had agreed to dismiss their respective bill and cross bill and give mutual releases and discharges to each other, and that the contract be cancelled and the earnest money returned to complainant, but that the Trust Company refuses to release the escrow agreement or the contract without specific instructions from Mullay, who refuses to give the same unless paid his commission, which the Haviars refused to pay, and that Mullay was the only party to said escrow agreement entered into with the Trust Company for the deposit of

contract under which her husband was interested at the time, and alleged subsequently the same facts in a cross bill. Further alleging that complainant, acting through his agent Wiley, induced her husband to sign the contract, knowing of his intoxicated condition, and at the same time caused her husband to take her by threats, etc., as a sign said contract. John Hovier set up in his answer substantially the same facts that he was induced by Wiley to sign the contract while he was in a drunken condition and had no knowledge or understanding of what he was doing, and also filed a cross bill protected on substantially the same allegations. The cross bills sought to have the contract declared null and void, and removed as a cloud upon the title of the property. Issues were taken on the allegations set up in the cross bills by Hovier's answers thereto.

Some months later Hovier filed a petition for leave to file a supplemental bill against the Chicago Title & Trust Company and Thomas H. Wiley, and on leave being given the bill was filed and said parties summoned as new parties defendant. The supplemental bill, so-called, set forth the facts as

to the filing of the original bill for the purpose of obtaining specific performance of said contract, and of the filing of said answer and cross bill of Bertha Hovier, and that rather than engage in protracted litigation the parties to the original bill had agreed to dismiss their respective bill and cross bill and give mutual releases and discharge to each other, and that the contract be cancelled and the earnest money returned to complainant, but that the Trust Company refused to release the earnest money on the contract without specific instructions from Wiley, who refused to give the same unless paid his commission, which the Hoviers refused to pay, and that Wiley was the only party to said contract entered into with the Trust Company for the deposit of

the contract and earnest money with it.

Joint and several answers to the supplemental bill were filed by John and Bertha Naviar admitting substantially all the allegations therein except that complainant was always ready, willing and able to carry out the terms of the contract, which had become, as between the parties to the original bill, an immaterial averment. In other words no relief was sought except under the supplemental bill against said additional parties.

The Chicago Title & Trust Company filed an answer to the supplemental bill admitting that the contract and earnest money had been deposited with it by Mully, but under an escrow agreement signed by him only, by the terms of which the contract and earnest money were to be delivered only on the "joint order of the undersigned," and that it has not been instructed or ordered by said Mully to that effect. The answer claimed that it was entitled to escrow fees, and asked the court that the delivery of the contract be conditioned upon their payment.

To the supplemental bill Mully filed a general and special demurrer alleging that there is no equity apparent on the face of the supplemental bill, that complainant had a complete and adequate remedy at law, that the remedy sought and relief asked by the supplemental bill are inconsistent with that sought in the original bill, and that there was no privity between complainant and Mully respecting the alleged escrow agreement. The demurrer being overruled, and defendant Mully electing to stand by the same, an order of default was taken against him for failure to answer the supplemental bill, and a decree was entered ordering the Trust Company to deliver up the contract to Bertha Naviar for cancellation, and the earnest money to Moshinsky, and that Moshinsky execute and deliver a quitclaim deed to Bertha Naviar upon her delivering to him a release of claim for damages.

the contract and earnest money with it. The Chicago Title & Trust Company filed an answer to the supplemental bill, and John and several answers to the supplemental bill were filed by John and Bertha Hays, admitting substantially all the allegations therein except that complainant was always ready, willing and able to carry out the terms of the contract, which had become, as between the parties to the original bill, an immaterial event. In that case no bill was sought except under the supplemental bill against said additional parties.

The Chicago Title & Trust Company filed an answer to the supplemental bill admitting that the contract and earnest money had been deposited with it by Hays, but under an escrow agreement signed by him only, by the terms of which the contract and earnest money were to be delivered only on the "joint order of the undersigned," and that it has not been instructed or ordered by said Hays to that effect. The answer claimed that it was entitled to recover there, and asked the court that the delivery of the contract be conditioned upon their payment.

To the supplemental bill Hays filed a general and special demurrer alleging that there is no equity apparent on the face of the supplemental bill, that complainant had a complete and adequate remedy at law, that the contract sought and relief asked by the supplemental bill are inconsistent with that sought in the original bill, and that there was no privity between complainant and Hays respecting the alleged escrow agreement. The demurrer being overruled, and defendant Hays electing to stand by the same, an order of default was taken against him for failure to answer the supplemental bill, and a decree was entered ordering the Trust Company to deliver up the contract to Bertha Hays for cancellation, and the earnest money to Hays, and that Hays execute and deliver a written deed to Bertha Hays upon her delivery to her a release of claim for damages.

The Javiers have not entered appearance here, and on motion of Mullan there has been a severance of the co-plaintiffs in error. He alone assigned errors. The Chicago Title & Trust Company has entered its appearance and filed a brief expressing its satisfaction with the decree and in effect advocating its affirmance, a position somewhat inconsistent with its position in the court below.

It is apparent, and conceded by the Trust Company, that the so-called supplemental bill is not germane to or consistent with the original bill. The purpose and object of the latter were to enforce the contract of sale, and of the former, to have it cancelled and declared null and void. Their inconsistency in that respect, as well as with respect to the subject matter on which relief is sought, is fatal. A supplemental bill should not make an entirely different case from that stated in the original bill. The facts set out therein must be such as are in furtherance of the general object of the original bill and not destructive of it, as is manifestly the case here. (Vol. 10, Ruling Case Law, sec. 283, p. 502.) The supplemental matter having no connection with the ground of relief set forth in the original bill and lending it no support, the supplemental bill should have been dismissed. (Fahs et al. v. Roberts et al., 55 Ill. 192; Langlois v. People, 212 Ill. 85.)

If the supplemental bill was vulnerable to the demurrer on the ground stated, as we hold, it is unnecessary to discuss other grounds on which it is predicated or what are the relative rights of the parties to the supplemental bill. So far as the original parties are concerned it would seem that they are able to carry out their agreement set up in the supplemental bill without the aid of a court of equity.

It is suggested in the brief for the Trust Company

The parties have not entered appearance here, and on motion of Miller there has been a severance of the co-plaintiffs in error. It alone assigned error. The Chicago Title & Trust Company has entered its appearance and filed a brief explaining its satisfaction with the decree and in effect advocating its affirmance. A position somewhat inconsistent with its position in the court below.

It is apparent, and conceded by the Trust Company, that the so-called supplemental bill is not germane to or consistent with the original bill. The purpose and object of the latter were to enforce the contract of sale, and of the former, to have it cancelled and declared null and void. Their inconsistency is thus apparent, as well as with respect to the subject matter on which relief is sought, in fact. A supplemental bill should not make an entirely different case from that stated in the original bill. The facts set out therein must be such as are in furtherance of the general object of the original bill and not destructive of it, as is manifestly the case here. (Vol. 10, Illinois Case Law, sec. 502, p. 502.) The supplemental matter having no connection with the grounds of relief set forth in the original bill and founding it no support, the supplemental bill should have been dismissed. (Wheeler et al. v. Republic et al., 88 Ill. 181; Wheeler v. Republic, 212 Ill. 28.)

If the supplemental bill was vulnerable as the decedent on the ground stated, as we hold, it is unnecessary to discuss other grounds on which it is predicated or what are the relative rights of the parties to the supplemental bill. So far as the original parties are concerned it would seem that they are able to carry out their agreement set up in the supplemental bill without the aid of a court of equity. It is suggested in the brief for the Trust Company

that the supplemental bill, though not strictly one, could be maintained as an original bill in the nature of a supplemental bill, but in our opinion it does not conform to the requirements of such a bill, either in its purpose or character.

The decree is reversed and the cause remanded with directions to sustain the demurrer and dismiss the supplemental bill.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley and Wells, JJ., concur.

245 I.A. 624⁴

17 - 31661

DAVID SAUL KLAFTER,
Appellee,

v.

L. A. SHERWIN,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiff's amended statement of claim gave defendant credit for \$100 on a claim of \$300 for "architectural services" in the year 1923, in examining, estimating the cost, and testifying in court as an expert, with reference to certain described premises, for which services it was alleged defendant agreed to pay.

Defendant pleaded that the services rendered by plaintiff were for the purpose of acquainting himself with the condition of the premises and with regard thereto as a witness in a case in which he had been subpoenaed, and denied that he rendered any other service, or could recover for services rendered as a witness.

The case was tried without a jury. From a judgment for \$200 this appeal was taken.

Plaintiff abandoned any claim to recover for services rendered as a witness in testifying, and claimed only for services rendered in "checking up" work that had been done by a contractor on the premises in question.

It appears that the suit in which plaintiff was subpoenaed as a witness, was brought by the contractor, one Reidenour, and was entitled Reidenour v. Armstrong et al.; that defendant herein was attorney for defendants in said suit and in that capacity requested plaintiff to inspect said premises to refresh his

17 - 2121

APPEAL FROM JUDGMENT

COURT OF CHICAGO

I. A. SHERMAN
Appellant.

MR. JUSTICE JUSTICE

DELIVERED THE OPINION OF THE COURT.

Plaintiff's amended statement of claim gave defendant

credit for \$100 on a claim of \$200 for "architectural services"

in the year 1922, in examining, estimating the cost, and testifying
in court as an expert, with reference to certain described premises.

For which services it was alleged defendant agreed to pay.

Defendant pleaded that the services rendered by plaintiff

were for the purpose of securing himself with the condition of

the premises and with regard thereto as a witness in a case in which
he had been subpoenaed, and denied that he rendered any other services.

or could recover for services rendered as a witness.

The case was tried without a jury. From a judgment

for \$200 this appeal was taken.

Plaintiff abandoned any claim to recover for services

rendered as a witness in testifying, and claimed only for services

rendered in "checking up" work that had been done by a contractor

on the premises in question.

It appears that the suit in which plaintiff was subpoenaed

as a witness, was brought by the contractor, one Reichenow, and

was entitled Reichenow v. Sherman et al.; that defendant herein

was attorney for defendant in said suit and in that capacity

requested plaintiff to inspect said premises to return his

memory of his previous knowledge of the building acquired in 1919, for the purpose of testifying as to work done thereon and that plaintiff made the inspection on January 15, 1922.

Plaintiff on his direct examination testified that he was at the building seven times in 1922, and claimed that the value of his services was at the rate of \$100 a day. It appears that he was paid \$100 in March, 1922, on account, as claimed by him, in full, as claimed by defendant. But while plaintiff so testified he admitted on cross examination that he went to the building for the purposes of such inspection on only one day in 1922, although alleging in his statement of claim that it was in 1923, evidently meaning 1922. This admission makes it difficult to understand upon what theory the court allowed \$300 for his services, and gave judgment for the balance of \$200.

In his original sworn statement of claim plaintiff alleged that defendant "agreed to pay \$200 for his services." In his sworn amended statement of claim he relied not on an agreement for an express sum but on a quantum meruit, claiming that the services were reasonably worth \$300, of which he had received \$100. As facts the two sworn statements are contradictory. Nor can plaintiff's testimony on the direct examination that he was at the place seven working days in 1922 be reconciled with his admission on cross examination that he was there only once in 1922. In view of such contradictory statements under oath by plaintiff, and admissions supporting the testimony of defendant that he was sent there to refresh his recollection of the building he had visited before on another occasion so that he could testify as to its condition at the time of his prior visit, we think, there being no other witnesses or corroborative evidence, that plaintiff failed to sustain the cause of action by a preponderance of

memory of his previous knowledge of the building occupied in 1932,
for the purpose of testifying as to work done thereon and that
plaintiff made the inspection on January 15, 1932.
Plaintiff on his direct examination testified that he
was at the building seven times in 1932, and claimed that the
value of his services was at the rate of \$100 a day. It appears
that he was paid \$100 in March, 1932, on account, as claimed by
him, in full, as claimed by defendant. But while plaintiff so
testified he admitted on cross examination that he went to the
building for the purpose of such inspection on only one day in
1932, although alleging in his statement of claim that it was in
1932, obviously meaning 1932. This admission makes it difficult
to understand upon what theory the court allowed \$200 for his
services, and gave judgment for the balance of \$200.
In his original sworn statement of claim plaintiff
alleged that defendant "agreed to pay \$200 for his services." In
his cross examined statement of claim he relied not on an agreement
for an expense but on a quantum meruit, claiming that the
services were reasonably worth \$200, of which he had received
\$100. As facts the two sworn statements are contradictory. Now
our plaintiff's testimony on the direct examination that he was
at the place seven working days in 1932 he reconciled with his
admission on cross examination that he was there only once in 1932.
In view of such contradictory statements made only by plaintiff,
and admissions supporting the testimony of defendant that he was
sent there to witness his recollection of the building he had
visited before on another occasion so that he could testify as to
the condition at the time of his later visit, we think, there being
no other witnesses or corroborative evidence, that plaintiff
failed to sustain the case of action by a preponderance of

-3-

evidence, and that he was fully paid for his services.

Accordingly the judgment is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

Gridley and Wells, JJ., concur.

...and that he was fairly paid for his services.
...the judgment is reversed with a finding
of fact.

THE JUDICIAL VITIATING OF FACTS

...the court is not to be bound by the facts as stated in the pleadings.

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...the court is not to be bound by the facts as stated in the pleadings.

...the court is not to be bound by the facts as stated in the pleadings.

17 - 31661

FINDING OF FACT.

We find that plaintiff spent only one day's time for the services for which he brought suit and that he has been paid therefor in full.

WITNESS TO FACT.

He then said that himself spent only one day's time for the services for which he brought suit and that he has been paid twenty in full.

WITNESS TO FACT
 WITNESS TO FACT
 WITNESS TO FACT
 WITNESS TO FACT

84 - 31692

LEO S. KOSITCHER,
Appellee,

v.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.WILLIAM DOWNS, doing business
as Drexel Square Garage,
Appellant.MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiff placed his automobile in defendant's garage for storage on hire, from which it was stolen, and on the theory of defendant's negligence recovered a judgment in this action for \$2100.

While appellant contends that whatever presumption of negligence obtained against him as bailee was overcome by evidence not rebutted by plaintiff, he also urges that the proper rule as to the measure of damages was not applied, and that the court erred in its instructions to the jury.

In view of our conclusion that the latter ground is well taken and that the judgment must be reversed and the cause remanded, we need not discuss the evidence bearing on negligence. It is enough to say, however, in regard thereto that we think there was sufficient evidence on that question to warrant a verdict of guilty.

Plaintiff's case was evidently tried on the theory that the measure of damages, as stated in an instruction given at his request, was the difference between a fair market price at the time the car was stolen and its condition as wreckage when found and returned. He introduced evidence tending to show that its value when stolen was between \$2000 and \$2100, and only

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1. The following information was obtained from the records of the Federal Bureau of Investigation, Bureau of Prisons, and the United States Department of Justice, regarding the activities of the above named individuals:

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It is of our conviction that the evidence presented is well taken and that the judgment must be reversed and the case remanded, we need not discuss the evidence bearing on negligence. It is enough to say, however, in regard thereto that we think there was sufficient evidence on that question to warrant a finding of guilt.

Plaintiff's case was evidently cited on the theory that the measure of damages, as stated in an instruction given at the request, was the difference between a fair market price at the time the car was stolen and its condition as a going concern when found and returned. No instruction was found to show that the value was stated was between \$100 and \$150 and only

\$150 when returned. He also introduced evidence that it was repaired at a cost of \$230 and afterwards sold - though for what price was not shown. Upon the latter state of facts a different rule as to the measure of damages would apply, namely, the cost of the repairs, and in addition thereto the difference between the value of the property after it had been repaired and its value before the injury, and there might also be the element of loss of use, if claimed. (McDonnell v. Lake Erie & Western Ry. Co., 208 Ill. App. 442, 454; Koch v. Pearson, 219 Ill. App. 466, 471.) Defendant introduced evidence to the effect that the fair market value after repairs was between \$1400 and \$1500, about \$600 or \$700 less than what plaintiff claimed was its market value at the time it was stolen.

The only instruction given on the measure of damages was one requested by plaintiff to the effect that if the jury found defendant guilty they should apply the rule of the difference between the fair market price when the car was taken, less its market value on the date it was recovered. This was error. This instruction treated the case as one where the automobile was so injured as to leave nothing but wreckage, whereas by plaintiff's own proof the car had been repaired at a cost of \$230 and subsequently sold, and defendant made proof of its value of \$1400 to \$1500 after repair. Upon the latter state of facts the rule given in the instruction would not apply. Plaintiff's own proof showing a repair of the automobile and its subsequent sale is inconsistent with the theory upon which his requested instruction was given.

Where there is a controversy as to which state of facts exists the jury should be left to determine the facts and be given a rule of damages that would apply to whatever facts it finds. The effect of the instruction was to tell the jury to ignore the evidence as to the value of the car after it was repaired.

Accordingly the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley and Wells, JJ., concur.

...when returned. He also introduced evidence that it was
repaired at a cost of \$1200 and afterwards sold - through the
price was not shown. From the latter state of facts a different
rule as to the measure of damages would apply. Namely, the value
of the property, and in addition, there is the difference between the
value of the property after it has been repaired and its value
before the injury, and there might also be the amount of loss
as was, it claimed. (Exhibit) v. ...
... 1911. App. 481, 484; ...
... Defendant introduced evidence to the effect that the fair
market value after repairs was between \$1200 and \$1300, about \$1250
or \$1300 less than what plaintiff claimed was the market value at
the time it was injured.
The only instruction given on the measure of damages was
one requested by plaintiff to the effect that if the jury found
... they should apply the rule of the difference
between the fair market value when the car was taken, less the
market value on the date it was repaired. This was error. This
instruction treated the case as one where the automobile was so
injured as to leave nothing but wreckage, whereas by plaintiff's
proof the car had been repaired at a cost of \$1200 and approx-
imately sold, and defendant made proof of its value of \$1200 to
\$1300 after repairs. Upon the latter state of facts the rule given
in the instruction would not apply. Plaintiff's own proof showing
a repair of the automobile and its subsequent sale in immediate
with the theory upon which his requested instruction was given.
Where there is a controversy as to which state of facts exists
the jury should be left to determine the facts and be given a rule
of damages that will apply to whatever facts it finds. The effect
of the instruction was to tell the jury to ignore the evidence as
to the value of the car after it was repaired.
Accordingly the judgment is reversed and the cause remanded.
...
... and value. It is, however.

JOHN BHARDT,
Appellee,
v.
MAX SUGERMAN,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against defendant for \$450 entered on the verdict of the jury.

Plaintiff alleged an agreement by defendant on May 15, 1924, to pay him \$450 to surrender possession of certain premises, which it is conceded plaintiff held as defendant's tenant from month to month.

Defendant had executed a lease to the premises to expire June 1, 1924, to one Christman who conducted a restaurant therein until he sold it in August, 1924, to plaintiff. Thereafter plaintiff occupied the premises, not under the prior lease to Christman but as tenant from month to month as aforesaid. Christman had deposited with defendant as security for the last two months rent under his lease the sum of \$450. No claim is made for that money by plaintiff except by special agreement made as aforesaid in May, 1924, as he claims, to pay the sum to him if he would vacate the premises by June 1, so defendant could give possession thereof to one Pawlan under a lease to the latter. The proof tends to show that plaintiff did not in fact surrender the premises until some time later in the month of June. The evidence tends to show, therefore, that he did not comply with the agreement which he claims was made,

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APPEAL FROM DECISION
COURT IN CHIEF

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On the contrary, defendant contends that plaintiff desired to surrender possession of the premises because he was losing money in the restaurant business, and on condition of his vacating defendant executed the lease to Pawlan. But as Pawlan's check, given in advance, was returned for nonpayment defendant testified that he then offered Shardt \$200 if he would stay in the premises, and that Shardt agreed to do so but abandoned the premises during the month of June and defendant was forced to accept Pawlan as tenant from July 1.

It is urged by appellant that the verdict is not supported by a preponderance of evidence, and we concur in that contention. The proof is not in accordance with the theory of the statement of claim which is to the effect that plaintiff was to, and did, deliver possession of the premises on June 1, 1924. His own proof is that he vacated them on June 2, put a lock on the door and delivered the key to another tenant of defendant (occupying other premises.) The proof does not show that such tenant was authorized to receive the key for defendant, or that defendant knew of the delivery to him. Furthermore, it appears that plaintiff did not remove all of his property from the premises until several days later than June 2.

Accordingly the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley and Wells, JJ., concur.

On the contrary, defendant contends that plaintiff received a certain possession of the premises because he was having money in the restaurant business, and on condition of his working defendant executed the lease to him. But as Taylor's check, given in advance, was returned for nonpayment defendant testified that he then offered \$2500 of his own to pay in the premises, and that Taylor agreed to do so but abandoned the premises during the month of June and defendant was forced to accept Taylor as tenant from July 1.

It is urged by appellant that the verdict is not supported by a preponderance of evidence, and we cannot in that contention. The great issue in connection with the issue of the defendant's claim which is to the effect that plaintiff was to, and did, deliver possession of the premises on June 2, 1914. His own proof in that he vacated them on June 2, put a lock on the door and delivered the key to another tenant of defendant (unoccupied other premises). The great issue was then what tenant was authorized to receive the key for defendant, or that defendant knew of the delivery to him. Defendant, it appears that plaintiff did not remove all of his property from the premises until several days later than June 2, 1914. Accordingly the judgment is reversed and the cause remanded.

REVEREND AND HONORABLE JUDGES OF THE SUPREME COURT OF THE STATE OF TEXAS.

JOHN W. HARRIS, JR., COUNSELOR.

THE STATE OF TEXAS, COUNTY OF DALLAS, ss. I, the undersigned, Clerk of the County Court, do hereby certify that the foregoing is a true and correct copy of the original of the same as the same appears from the records of the County Court of Dallas County, Texas.

M. W. FREEMAN, doing business
as M. W. Freeman & Company,
Appellee,

v.

MAURICE S. FELDMAN et al.,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The statement of claim herein alleged that pursuant to his employment by defendants as broker to sell certain real estate plaintiff submitted it to one Garrod; that thereafter Garrod and defendants executed a contract wherein the former agreed to buy, and the latter to sell, said real estate, and wherein it was agreed that "defendants would pay plaintiff the sum of \$600 as and for a broker's commission for his services in procuring said contract;" that the said Garrod "was ready, willing and able to purchase under the terms and conditions laid down in the contract;" and that on demand for commissions defendants had refused to pay them.

On submission of the evidence the court gave an instructed verdict for said sum. Defendants appealed.

Defendants pleaded that plaintiff prepared the contract and in it negligently described a second trust deed of the premises securing a note for approximately \$9,500, subject to which the premises were to be sold, and that it was by reason of a misdescription of its terms said Garrod refused to carry out the contract.

Plaintiff evidently acted as the agent or broker of both parties in drawing the contract. That he might have a

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The statement of John Edgar Hoover is contained in his report to the President of the United States, dated January 1, 1938, and is set forth in the following pages. It is a statement of the facts as they are known to the Director of the Federal Bureau of Investigation, and is not a statement of the facts as they are known to the President of the United States. It is a statement of the facts as they are known to the Director of the Federal Bureau of Investigation, and is not a statement of the facts as they are known to the President of the United States.

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With respect to the above, the following is a summary of the information received from the Bureau of the Census, Department of Commerce, and the Bureau of Economic Warfare, Department of War, regarding the activities of the above-named individuals and organizations in the United States and abroad.

proper description of the encumbrances to which the deed was to be subject, defendant Maurice Feldman handed plaintiff a Torrens certificate and the second mortgage (or trust deed) itself from which plaintiff could draw the contract. The terms of payment of said mortgage as inserted in the contract were incorrect, and being variant from those in the mortgage itself and as recorded, Garrod refused to carry out the contract. He had signed it in blank, and later defendants signed it without knowledge of such misdescription.

Defendants offered to show that before they signed the contract, an endorsement, under plaintiff's authorized signature, was placed on the copy of the contract handed to defendants, to the effect that said second mortgage was subject to a first mortgage of \$7,500, and that "in the event first party (Garrod) fails to carry out the contract and forfeits the earnest money the agent herein (plaintiff) agrees to accept \$300 as their share of the commissions." Over objection the court refused to receive the proof.

The contract recited on its face a payment by Garrod of \$1,000 as earnest money to be applied on the purchase price when consummated by conveyance of a good and merchantable title, and to be retained by the vendor as liquidated damages if the purchaser failed to perform the contract, the same to be held by plaintiff for the mutual benefit of the parties, to be applied, first, to the payment of any expenses incurred; and, second, to the payment of a commission of \$600 "for his services in procuring this contract, rendering the overplus to the vendor."

It appears, however, that the earnest money was never paid but that plaintiff took Garrod's note, and afterwards returned it to Garrod when he refused to perform because of such misdescription of the second mortgage.

Defendants also offered to show that about two weeks

after the contract was signed plaintiff called up Maurice by telephone and told him "there is a mistake in the contract; we can't consummate the deal," and that because of the mistake Garred would not go through with the contract; also that later Maurice had further conversations with plaintiff offering to make concessions, if the deal could go through, and plaintiff told him the deal was off, that he had already returned the earnest money to Garred. The refusal of the court to receive such evidence is also urged as error.

We think the court erred in rejecting all of such offered testimony. It was the theory of the court, evidently, that the contract without said endorsement on the copy left with the defendants constituted a written agreement between plaintiff and defendants, as well as between the parties thereto, which could not be varied by parol.

But in our opinion proof of the rejected endorsement would have shown that the contract on its face did not constitute the entire written contract with plaintiff, and should have been admitted. The rejected proof tended to show that before defendants signed the contract the copy thereof given to them by plaintiff had endorsed thereon an express agreement under his authorized signature which constituted a part of his written contract with them, by which he specifically agreed as their agent that in case Garred failed to carry out the contract and forfeited his earnest money he as their agent would accept \$300 as commissions.

But the contract contemplated that the plaintiff should hold \$1000 cash as earnest money out of which under certain contingencies his commission was to be paid. In the body of the contract itself it is provided that if the purchaser fails to

After the contract was signed plaintiff called up Harris by telephone and told him "there is a mistake in the contract; we can't consummate the deal," and that because of the mistake Harris would not go through with the contract; also that under the contract Harris was to pay plaintiff \$5000. Harris told him the deal was off, that he had already returned the earnest money to Harris. The return of the money to Harris was evidence in this case as to the error.

It is the duty of the court in rejecting all of such alleged testimony. It was the theory of the court, obviously, that the contract without said endorsement on the copy left with the defendant constituted a written agreement between plaintiff and defendant, as well as between the parties thereto, which could not be varied by parol.

It is the duty of the court in rejecting such evidence to have shown that the contract on its face did not constitute the entire written contract with plaintiff, and should have been admitted. The rejected proof tended to show that before defendant signed the contract the copy thereof given to him by plaintiff had endorsed thereon an express agreement under his endorsement signature which constituted a part of his written contract with him, by which he agreed to pay to plaintiff \$5000. It is also stated that he gave out the contract and received his earnest money in a check for \$5000 as consideration.

But the contract contemplated that the plaintiff should have paid an earnest money out of which under certain conditions his commission was to be paid. In the body of the contract itself it is provided that if the purchaser fails to

perform the vendor at his option may retain the earnest money as liquidated damages, and the contract shall thereupon become and be null and void, and that plaintiff shall hold the contract and earnest money for the mutual benefit of the parties, and that it shall be his duty in case said earnest money is retained to apply the same, first, to the payment of expenses incurred by the vendor, and, second, to payment "to vendor's broker of a commission of \$600. * * * for his services in procuring this contract, rendering the overplus to the vendor." Instead of requiring such earnest money he took a note from Garrod, and afterwards returned it, thus depriving the vendor of the right to exercise his option to retain the money out of which the commission was to be paid.

In view of these terms of the contract between plaintiff and defendants the evidence adduced and improperly rejected would disclose that he did not carry out his part of the contract. He did not, as recited in the contract, receive and hold the sum of \$1,000 out of which his commission under certain contingencies was to be paid, and without defendant's knowledge or consent accepted and subsequently surrendered Garrod's note as a substitute therefor.

It is said in Wilson v. Mason, 158 Ill. 304, (repeated in Fox v. Ryan, 240 Ill. 391), that "an agreement by a real estate broker in procuring a purchaser not only implies that the purchaser shall be one able to comply, but that the seller and the purchaser must be bound to each other in a valid contract, * * * mutually obligatory upon the vendor and the vendee." That is not the case here. The contract provides that in case of material defects found in the title that could not be cured within fifteen days it should, at the purchaser's option, become absolutely null and void, and the earnest money should be returned. It is clear that the objection

proceed the vendor at his option may retain the earnest money as
liquidated damages, and the contract shall thereupon become and
be null and void, and that plaintiff shall hold the contract and
earnest money for the benefit of the parties, and that
it shall be his duty in case said earnest money is retained to
pay the same. First, in the payment of expenses incurred by the
vendor, and, second, to payment to vendor of a commission
of 5 per cent. * * * for his services in procuring this contract,
returning the earnings to the vendor. Instead of returning said
earnest money he took a note from vendor, and afterwards returned
it, thus depriving the vendor of the right to cancel his option
to retain the money out of which the commission was to be paid.
In view of these terms of the contract between plaintiff
and defendant the witness advised and testified that he
disclosed that he did not carry out his part of the contract. He
did not, as recited in the contract, receive and hold the sum of
\$1,000 out of which his commission under certain contingencies
was to be paid, and without defendant's knowledge or consent
received and subsequently returned to vendor a note as a substitute
therefor.
It is said in Wright v. Hagg, 128 Ill. 304, (repeated
in Law v. Law, 343 Ill. 301), that "an agreement by a real estate
broker to procure a purchaser not only implies that the purchaser
shall be one who is capable, but that the seller and the purchaser
shall be bound to each other in a valid contract, * * * mutually
obligatory upon the vendor and the vendee." That is not the case
here. The contract provides that in case of material default before
the title shall be conveyed within fifteen days it should,
at the vendee's option, become absolutely null and void, and the
earnest money should be returned. It is also that the objection

to the title was well taken as the defect could not be cured or removed without a modification of the contract, or its cancellation and entering into one containing different terms. There was no obligation, therefore, on the part of the purchaser to take the property with such defect of title.

It was not the fault of the parties to the contract that plaintiff made a misdescription of the second encumbrance. Whether it amounted to a misrepresentation or an innocent mistake, it was the result of his negligence, acting as broker for both parties, for when he drew the contract he had before him a proper description of the encumbrance furnished him by defendants. He owed them the duty of drawing the contract in accordance with their known intentions. This he did not do, but drew one not enforceable against the purchaser, and in which there was not a meeting of the minds of the parties, the purchaser supposing the terms of the mortgage he would be expected to meet were as stated in the contract, and defendants, that the terms as they appeared of record were properly recited. The contract was unenforceable by reason of such mutual mistake of fact rendered so by plaintiff's own negligence. It is the duty of a broker to exercise reasonable skill, care and prudence, and a breach of any of these furnishes a right of action on the part of his principal. The nature of plaintiff's employment by defendants was to bring to them a purchaser ready, able and willing to purchase on the terms at which they offered to make the sale. He brought a purchaser on different terms that the latter would not accept and with which his principal could not comply. He did not carry out such an arrangement as he was employed to make. While the contract itself provided for the amount of the commission and how it was to be paid "in procuring the contract," yet it was contemplated that the contract would

to the title was well known as the defect could not be cured or
removed without a modification of the contract, or the cancellation
and entering into one containing different terms. There was no
obligation, therefore, on the part of the purchaser to take the
property with such defect of title.

It was not the fault of the vendor in the contract that
plaintiff made a misdescription of the second encumbrance. Whether
it amounted to a misrepresentation or an innocent mistake, it was
the result of his negligence, acting as a prudent lay person.
For when he drew the contract he had before him a proper description
of the encumbrance furnished him by defendant. He took from the
deed of drawing the contract in accordance with their known infor-
mation. This he did not do, but drew one not entitling against the
purchaser, and in which there was not a vesting of the title of the
vendor, the purchaser supposing the terms of the mortgage he would
be expected to meet were as stated in the contract, and defendant,
that the terms as they appeared at record were properly recorded.
The contract was unentitled by reason of such mutual mistake of
fact rendered so by plaintiff's own negligence. It is the duty of
a person to exercise reasonable skill, care and judgment, and a
breach of any of these constitutes a right of action on the part
of his principal. The nature of plaintiff's employment by
defendant was to bring to them a purchaser ready, able and
willing to purchase on the terms as which they offered to make
the sale. He brought a purchaser on different terms than the
latter would not accept and with which his principal could not
comply. He did not carry out such an arrangement as he was
employed to make. While the contract itself provided for the
amount of the commission and how it was to be paid in procuring
the contract, yet it was contemplated that the contract would

be drawn up in accordance with the actual condition of the title plaintiff was employed to negotiate.

We think the court erred in its rulings upon evidence and in instructing a verdict for plaintiff, and not granting a new trial.

Accordingly the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley and Wells, JJ., concur.

It is not the intention of the Commission to make any recommendation as to the merits of the case.

... ..

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 26

REPORT ON THE PROGRESS OF THE WORK DURING THE YEAR 1900.

* 60-15789

(6) 7-10-80 23 9210 100 0013795

GUSTAV HOFFMAN,
Appellee,

v.

FRANK SCHAFER and
ANNE C. SCHAFER,
Appellants.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Defendants filed an attachment against plaintiff and gave a bond for \$700 therein with the Maryland Casualty Company as surety. The attachment was quashed and a demand made upon the obligors to pay the sum of \$700. On their refusal to comply this suit was brought on the bond. Nonsuit was taken against the company and the declaration was amended. Defendants did not file pleas to the amended declaration.

The attachment issue was first tried in the proceeding against Hoffman and decided in his favor. He claims damages for attaching his bank account and depriving him of its use, and for his expenditures in the attachment suit. From a verdict for \$400 in his favor this appeal was taken.

As the case was finally submitted the jury were limited to a finding of the value of plaintiff's attorney's fees in getting the writ of attachment quashed in the attachment suit. In the attachment suit \$190 were demanded and \$87 allowed. The bank account attached amounted to \$531.63. In procuring the quashing of the attachment in a case involving such a small amount we think the allowance of \$400 as attorney's fees was excessive and unwarranted. As we may take judicial notice of what are

2451A. 685

175 - 11701

APPEAL FROM CIRCUIT COURT OF THE COUNTY OF...

JOHN T. SCOTT, Plaintiff,
vs.
JOHN T. SCOTT, Defendant.

MR. PRESIDING JUDGE BARNES
PRESENTED THE OPINION OF THE COURT.

Defendants filed an attachment against plaintiff and gave a bond for \$700 therein with the Maryland Casualty Company as surety. The attachment was quashed and a demand made upon the obligors to pay the sum of \$700. On their refusal to comply this suit was brought on the bond. Verdict was taken against the company and the decision was amended. Defendants did not file plea to the amended decision.

The attachment issue was first tried in the proceeding against Hoffman and decided in his favor. He claims damages for attaching his bank account and depriving him of its use, and for his expenditures in the attachment suit. From a verdict for \$400 in his favor this appeal was taken.

As the case was finally submitted the jury were limited to a finding of the value of plaintiff's attorney's fees in getting the writ of attachment quashed in the attachment suit. In the attachment suit \$100 were demanded and \$25 allowed. The bank account attached amounted to \$251.43. In procuring the quashing of the attachment in a case involving such a small amount we think the allowance of \$400 as attorney's fees was excessive and unwarranted. As we may take judicial notice of what are

reasonable attorney's fees under such a state of facts we deem it unnecessary to analyze the evidence offered on that point. If plaintiff will remit to \$200 within ten days, the judgment will be affirmed for that amount. Otherwise it will be reversed and the cause remanded for a new trial.

AFFIRMED FOR \$200 ON REMITTITUR.

Gridley and Wells, JJ., concur.

need to adjust to change a new system and a 'change to oldness'

There is no doubt that the evidence is sufficient to establish that the defendant is guilty of the crime charged.

FILED - MEMPHIS MAY 10 1968

However, all of the following are not possible:

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245 T A. 625

193 - 31806

STANLEY LITWICKI,
Appellee,

v.

CITY OF CHICAGO,
Appellant.

}
} APPEAL FROM SUPERIOR COURT,
} COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for \$7,500 against the City of Chicago entered on the verdict of a jury in a personal injury suit.

As to appellant - the other defendants being found not guilty - the cause of action is predicated on negligence of the city in its maintenance of 31st street in permitting a hole to exist therein with actual or constructive knowledge of its existence, by reason of which an automobile in which plaintiff was riding ran into the hole in question whereby as a proximate result plaintiff was badly injured.

We think none of the points^{urged} for reversal is well taken. The first point that there should have been a directed verdict for defendant is based on the contention that there is no proof that the city had notice of the alleged defective condition in said street, or that by the exercise of ordinary care it could have had notice thereof. A witness who lived nearby testified to the existence of such hole for a year or more previous to the accident, and that it had been growing larger, wider and deeper in the meantime. The hole was located underneath the viaduct over which were elevated railroad tracks. 31st street is a paved street on which there are street cars which pass underneath the

1. Name of the person	2. Date of birth	3. Place of birth	4. Nationality
5. Address	6. Occupation	7. Education	8. Marital status
9. Date of entry	10. Date of departure	11. Date of return	12. Date of exit
13. Date of arrival	14. Date of departure	15. Date of return	16. Date of exit
17. Date of arrival	18. Date of departure	19. Date of return	20. Date of exit
21. Date of arrival	22. Date of departure	23. Date of return	24. Date of exit
25. Date of arrival	26. Date of departure	27. Date of return	28. Date of exit
29. Date of arrival	30. Date of departure	31. Date of return	32. Date of exit
33. Date of arrival	34. Date of departure	35. Date of return	36. Date of exit
37. Date of arrival	38. Date of departure	39. Date of return	40. Date of exit
41. Date of arrival	42. Date of departure	43. Date of return	44. Date of exit
45. Date of arrival	46. Date of departure	47. Date of return	48. Date of exit
49. Date of arrival	50. Date of departure	51. Date of return	52. Date of exit
53. Date of arrival	54. Date of departure	55. Date of return	56. Date of exit
57. Date of arrival	58. Date of departure	59. Date of return	60. Date of exit
61. Date of arrival	62. Date of departure	63. Date of return	64. Date of exit
65. Date of arrival	66. Date of departure	67. Date of return	68. Date of exit
69. Date of arrival	70. Date of departure	71. Date of return	72. Date of exit
73. Date of arrival	74. Date of departure	75. Date of return	76. Date of exit
77. Date of arrival	78. Date of departure	79. Date of return	80. Date of exit
81. Date of arrival	82. Date of departure	83. Date of return	84. Date of exit
85. Date of arrival	86. Date of departure	87. Date of return	88. Date of exit
89. Date of arrival	90. Date of departure	91. Date of return	92. Date of exit
93. Date of arrival	94. Date of departure	95. Date of return	96. Date of exit
97. Date of arrival	98. Date of departure	99. Date of return	100. Date of exit

STANDARDIZATION, PRACTICES, AND
TRENDS IN THE INTERNATIONAL
COMPARISON OF EDUCATIONAL
ACHIEVEMENT

Amesbury, 7415, 7416 and 7417, and a small lot of 7418 and 7419.

10-10-68

• 4103 •

Approved: _____ Date: _____

the policy - the cause of action is not stated in the complaint - the cause of action is not stated in the complaint - the cause of action is not stated in the complaint

at this time in the maintenance of that threat to

TO THE HONORABLE MEMBERS OF THE HOUSE OF REPRESENTATIVES

Approved for release by NSA on 08-28-2014 pursuant to E.O. 13526

THE UNIVERSITY OF CHICAGO

• brought killed her 17 children since 1960

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SECRET SECRET A GOOD COPY RETURNED TO THE OFFICE 2017 201

Let's assume it based on the conviction that there is a great

At all times, the subject was fully informed of the nature and purpose of the study.

also present, or that of the existence of mutually exclusive

There are several advantages to this approach:

10

Received 10 October 2005; accepted 11 November 2005; first published online 12 January 2006

10-11-68

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE

viaduct. The character of the street as disclosed from its use for traffic and street cars and as testified to and shown by a photograph, is such that if a hole of the size described existed there for a year or so, as testified to and not denied, it could hardly have escaped the attention of city authorities in the performance of their duties and, therefore, the city may be deemed to have had constructive notice thereof, and the jury was justified in so finding from such proof. "Generally, it is a question for the jury whether a city has had notice of a defect in a street. Where the facts are undisputed and but one reasonable inference can be drawn from them, it then becomes a question for the court." (Boender v. City of Harvey, 251 Ill. 228.) We do not think, therefore, that the element of notice of the defect, in the absence of direct evidence on the subject, can be said to be lacking so as to have justified granting defendant's motion for a verdict.

It is urged that there was no direct proof that 31st street was in the City of Chicago. A witness who testified to having observed the hole for a space of a year before the accident, testified that he was familiar with the location "in Chicago of the viaduct at Stewart avenue and 31st street." And other witnesses located the viaduct as at Stewart avenue and 31st street, and plaintiff testified that the accident happened in the City of Chicago. This was adequate proof that the place of the accident was on 31st street in Chicago, and that the street was subject to defendant's control and maintenance as a public street in said city.

It is urged that the instructions given for plaintiff are misleading because the jury are not told therein that the plaintiff must prove that the accident took place upon a street of the city, and that the city had actual, constructive notice of the alleged defective condition of the street in question.

... The character of the street as disclosed from the map
... the street and street name and as located in and shown by a
... is such that if a hole of the size mentioned existed
... as located in and not located, it would
... have caused the attention of city authorities in the
... of their action and, therefore, the city may be deemed
... and the city was located
... is a question for
... the city whether a city has had notice of a defect in a street
... and the city was not responsible for the defect
... it was known from time to time between a question for the city
... (Chicago v. City of Chicago, 111 Ill. 212.) It is not likely, however
... that the witness at notice of the defect in the location of
... and he would be liable for the defect, and he would be liable for the defect
... have located the defect's location for a verdict.
... It is argued that there was no direct proof that this
... was in the City of Chicago. A witness who testified to
... the hole for a space of a year before the location
... testified that he was familiar with the location "in Chicago at
... the street at Broadway Avenue and 11th Street," and other witnesses
... located the street as at Broadway Avenue and 11th Street, and again
... testified that the accident happened in the City of Chicago.
... This was adequate proof that the place of the accident was in this
... street in Chicago, and that the street was subject to the accident's
... caused and maintained as a public street in said city.
... It is argued that the instructions given for liability
... the defendant because the jury was not told that there was no
... liability was that the accident was caused by a defect
... of the city, and that the city had actual, constructive notice
... of the alleged defective condition of the street in question.

Only four instructions were given at plaintiff's request. None of them purported to set up the elements of the cause of action or what was required by way of proof to support the allegations of the declaration. They were stock instructions on the weight of evidence and damages, and no defect in them is pointed out.

It is urged that proper proof of the skiagraphs introduced in evidence was not made, claiming that none of the methods pointed out in Stevens v. Illinois Central R. R. Co., 306 Ill. 370, for the determination of their accuracy was followed. The methods there pointed out were not claimed to be exclusive, the court saying, "but whatever method is used its accuracy must be established before it is admitted." We do not find from the record that any objection was made to the accuracy of the skiagraphs introduced. The only objection noted in the record is as to their identity, about which there seems to have been no question. Before such objection was made the pictures had already been "read" to the jury without any objection to their accuracy or the method of taking them.

The contention that the verdict and judgment are against the law and the evidence is based on the alleged insufficiency of evidence already considered. It is enough to say as to the claim that the damages are excessive, without discussing the character of the injuries, which were severe and are permanent, that we find no occasion for disturbing the verdict.

AFFIRMED.

Gridley and Wells, JJ., concur.

BLAUER-GOLDSTONE COMPANY,
Appellant,

v.
KERNER MFG. COMPANY,
Appellee.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against plaintiff in a replevin suit tried without a jury, and an order for the issuance of a writ of reforming habendo.

The action was begun to recover from defendant 120 completed combination lamps and clocks commonly called "Lampelox," and 228 eight-day "Sessions" clocks. Under the writ the sheriff seized and delivered to plaintiff 120 Lampelox, 120 Sessions clocks with frames, and 16 without frames.

It is urged as ground for reversal that the title to the property replevined was in plaintiff.

The question arises under a written agreement in the form of a letter from plaintiff to defendant which was accepted by the latter and reads as follows:

"April 17, 1926.

Kerner Manufacturing Co.
1400 North Halsted Street
Chicago, Illinois
Attention: Mr. J. Kerner
Gentlemen:

You will please manufacture for us two thousand (2000) Lampelox in accordance with the sample of the same submitted to you, the same to be complete in all respects with materials to be furnished by you, and to be of the quality as represented by you and to be manufactured in a good, workmanlike and substantial manner except that we are to furnish you the clocks in perfect condition, which you are to place in said Lampelox, all wiring therein to

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Small and young

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This is an original from a judgment against plaintiff in

a judgment was tried against a jury, and an order for the

judgment of a writ of HABEAS CORPUS.

The action was begun to recover from defendant 100

negatives containing images and other property called "negatives",

and 200 copies of "Negatives" films. Under the writ the plaintiff

obtained and delivered to plaintiff 100 negatives, 100 copies

of the film, and 10 copies of the film.

It is noted on record for recovery that the 100

the property negatives was in plaintiff.

The question arises under a written agreement in the

form of a letter from plaintiff to defendant which was accepted

by the latter and reads as follows:

"April 17, 1904.

My dear Mr. [Name]

I have received your letter of the 14th inst.

and in reply to inform you that

the same has been forwarded to the proper authorities.

You will please understand that as the plaintiff

(plaintiff) has no objection with the terms of the same

submitted to you, the same to be complete in all respects

with reference to be furnished by you, and to be of the

quality as represented by you and to be manufactured in a

good, workmanlike and substantial manner except that we

are to furnish you the films in perfect condition, which

you are to place in each negative, all other things in

be insulated and to pass all fire requirements. Delivery to be made at the rate of two hundred (200) per week commencing two weeks after samples are delivered. These are to be packed in paper cartons to pass Interstate Commerce transportation requirements, for which we agree to pay you at the rate of \$9.25 f.o.b. our office, terms thirty days after delivery.

This order is given you with the express agreement that you shall not during the life of these patents manufacture or distribute the same article, or any imitation thereof, for any other person or concern, and we hereby agree to purchase all Lamplox from you exclusively so long as your price meets competition.

Blauer-Goldstone Co.
Joe Goldstone, Pres.

Accepted
Kernex Mfg. Co.
James Kernex, Pres."

Defendant proceeded to manufacture the Lamplox (a combination lamp and clock), the clocks being furnished by the plaintiff, and all the other materials entering into the article, including the labor, being furnished by the defendant. Deliveries were made under the contract beginning in May, until September 20, but controversies arising were stopped on two occasions.

Plaintiff being derelict in its payments defendant wrote plaintiff August 2nd, that unless it remitted for all past due invoices and arrangements were made to take out all ready lamps contracted for within four days defendant would take immediate action to collect the unpaid past due account and to dispose of the ready Lamplox, and finish and dispose of the balance of the Lamplox. An adjustment was evidently reached, for on August 16th a supplementary agreement was entered into whereby plaintiff agreed to pay "for merchandise from the Kernex Mfg. Co., within ten days from the date of the invoices, less 2%," all merchandise to be inspected by plaintiff before it left defendant, and any merchandise so inspected to be considered satisfactory in all respects. On September 23th defendant notified plaintiff by letter that by reason of plaintiff's failure and refusal to comply with

1. The first step in the process of identifying a problem is to determine the nature of the problem. This involves a thorough understanding of the situation and the factors that may be contributing to the problem. Once the nature of the problem is understood, the next step is to identify the causes of the problem. This involves a detailed analysis of the situation and the factors that may be contributing to the problem. Once the causes of the problem are identified, the next step is to develop a plan of action to address the problem. This involves determining the steps that need to be taken to resolve the problem and the resources that will be required to implement the plan. Finally, the last step in the process is to implement the plan and monitor the results. This involves putting the plan into action and tracking the progress of the implementation to ensure that the problem is resolved.

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and they are not concerned as much with the other things.

SECRET

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the terms of the agreement, as so modified, defendant elected to declare, and did declare, the contract terminated as of that date, and would proceed to dispose of the made-up clocks in its possession under the contract, and finish and dispose of the balance of Lampelox on plaintiff's order.

About two weeks before the replevin of the 120 Lampelox Goldstone, plaintiff's president, inspected them at defendant's factory and passed them as O. K., and afterwards had a conversation with Kernes, defendant's president, saying that he needed these Lampelox badly, and was told by the latter that he would not deliver them unless defendant agreed to take all he had in process of manufacture and straightened up the account. In that conversation Goldstone complained that certain Lampelox previously delivered were defective and had been returned by customers. In a still later conversation he testified that he asked Kernes to deliver the completed Lampelox and return the clocks that were not completed, and that he offered to pay for those that were completed and being "held up," and at that time made a written demand for possession of the "225 Sensations clocks," that Kernes refused to make delivery of the completed and inspected clocks unless plaintiff agreed to take those he had in process of manufacture. In a later conversation he testified that he represented that he was willing to pay for the completed Lampelox, but under no circumstances would he take those not according to sample. Plaintiff received an invoice September 14 for 74 Lampelox at \$9.25 each, \$684. He claimed the amount was not due because he had not inspected them as provided for in the supplemental agreement. The 120 clocks were packed, ready for shipment, but not shipped because not paid for.

It is the contention of appellant that the goods

contracted for and replevined were appropriated to the contract and that the title to them passed to appellant, and that the facts bring the case within Rule 4 (1), sec. 19 of the Illinois Sales Act (ch. 121a, par. 22, Cahill's Stats. 1927), and cites Rudin v. King-Richardson Co., 311 Ill. 513.

It is the contention of appellee that because it is agreed in the accepted letter of April 17th that plaintiff is to pay defendant at the rate of \$9.25 f.o.b. plaintiff's office, "terms 30 days after delivery" that the rights of the parties were determined by Rule 5 of said section, which provides: "If the contract of sale requires the seller to deliver the goods to the buyer, or at a particular place * * * the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

The agreement provided for delivery at plaintiff's office, f.o.b. It was said in Cook Brewing Co. v. Vaccaro, 183 Ill. App. 387, where the vendor agreed to sell and deliver to the vendee beer f.o.b. at the vendee's place of business, that the delivery must be at the vendee's home or place of business before title thereto vested in him. In the Rudin case, supra, the court in considering whether the goods were "unconditionally" appropriated to the contract by the seller so as to pass title said that the acts performed by the vendor in shipping the goods to the vendee in that case were the same as if the shipping had been made in accordance with the terms of the contract. Under those circumstances it held that the delivery of actual possession was not necessary to pass title. But here defendant retained the goods because they were not paid for according to the terms of the contract, and rescinded because of the breach thereof and gave notice of its election so to do, as provided for under section

65 of the Sales Act. Defendant was not required to go on after that time delivering under the contract without receiving payment therefor. (Burt v. Garden City Sand Co., 237 Ill. 473, 481.)

Furthermore, defendant had a lien for labor, skill or material expended upon the chattels for the contract price for such expenditure (ch. 82, par. 45, Cahill's Stats. 1927), and under section 54 of the Sales Act was entitled to retain possession of the goods until payment or tender of the price, they having been sold on credit and the term of credit having expired. The tender made was not for all of defendant's labor and expenditure, and the demand was for only a portion of the goods.

In Temerson v. Esakay Dress Corp., 197 N. Y. S. 580, there was a somewhat similar state of facts where certain materials were furnished by the plaintiff to the defendant, from which the defendant was to manufacture dresses. Deliveries of dresses were made and not paid for. Thereafter further deliveries were refused and replevin proceedings were instituted. It was there held that the plaintiff was not entitled to the return of materials furnished unless he took care of the artisan's lien, whereby the value of the materials was enhanced.

Replevin lies only by the owner or person entitled to the possession of the goods. If defendant was entitled to a lien on the goods in its possession or to retain them until payment or tender of the contract price, the action could not be maintained, and only an action for alleged breach of the contract would lie. (35 Cyc. (Sales) 612; Haverstick v. Fergus, 71 Ill. 105.)

It does not appear from the evidence whether or not there was any labor expended on the Sessions clocks replevined. If there was defendant had a lien therefor under the statute

and plaintiff would not be entitled to their possession without satisfying it. The burden was on plaintiff to show his right to their possession, and, therefore, to show that no labor had been expended on any of the material so replevined.

As to the rulings on evidence complained of, we find no reversible error and think the judgment should be affirmed.

AFFIRMED.

Gridley and Wells, JJ., concur.

MORRIS CHUDON et al.,
Appellees,

v.

HARRY SCHNEIDER,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The judgment herein appealed from was entered by confession August 5, 1934, against defendant, for July and August rent of certain premises leased to him, and attorney's fees, pursuant to terms of the lease, aggregating \$175, for about half of which defendant admits liability. A motion to vacate the same was presented in court November 13, 1936, and after a hearing had thereon, with a supplemental petition filed by leave of court, the motion was denied.

The only excuse offered for delay in presenting such motion was that negotiations were pending in the interim for settlement of the judgment. The court may well have regarded this as a poor excuse and that there was a lack of diligence in deferring the motion for so long a time.

We cannot say, therefore, that the court abused its discretion in denying the motion, whatever may have been the merits of the petition had it been presented within a reasonable time after knowledge of the judgment.

AFFIRMED.

Gridley and Wells, JJ., concur.

THE COURT OF APPEALS
IN THE MATTER OF THE ESTATE OF
JAMES M. HARRIS, DECEASED

IN REPLY TO THE PETITION
FOR THE APPOINTMENT OF AN ADMINISTRATOR

The petition was filed on the 10th day of January, 1934, and was captioned as above. The petition was signed by the petitioner, who is the husband of the deceased, and was verified by him. The petition set forth that the petitioner was the husband of the deceased, and that the deceased had died intestate. The petition also set forth that the petitioner was the sole surviving heir of the deceased, and that he was entitled to the administration of the estate of the deceased. The petition further set forth that the petitioner was unable to locate any other persons who might be entitled to the administration of the estate of the deceased, and that he was unable to locate any other persons who might be entitled to the administration of the estate of the deceased.

The only excuse offered for delay in presenting such motion was that negotiations were pending in the instant for settlement of the judgment. The court may well have regarded this as a poor excuse and that there was a lack of diligence in following the motion for so long a time.

We cannot say, therefore, that the court should be dissatisfied in denying the motion, whatever may have been the motion of the petitioner had it been presented within a reasonable time after knowledge of the judgment.

THE COURT

HARTMAN FURNITURE & CARPET COMPANY,
a corporation,

Appellee,

v.

HENRY MOWSCHINE et al.,

HENRY MOWSCHINE,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is a replevin suit in which a verdict was directed for plaintiff.

Plaintiff's evidence was to the effect that Mowschine purchased a phonograph from plaintiff on the installment plan on September 8, 1925, and to secure deferred payments executed a chattel mortgage thereon containing the usual clause as to the right of the mortgagee to take possession on default of payment of any installment; that the installments were to be paid on the 8th day of each month thereafter (except the last installment); that plaintiff's agent called on Mowschine after ten installments were due and had not^{been} paid and asked for payment of the same, and Mowschine refused to pay and refused to return the phonograph. None of this evidence was denied.

The defense called Mowschine's sister as a witness and offered to show by her that the phonograph selected by her brother at the time of the purchase was new and in perfect condition, and had a dull, satiny mahogany finish; that on unpacking the phonograph delivered it was found to be covered with scratches and indentations and had the appearance of having received rough usage and of not being new; that the same day or the following day Mowschine

notified plaintiff of its condition and demanded delivery of a phonograph in conformity with the one purchased; that plaintiff sent a person to examine the same, and later one of its employes came and attempted to fill up the scratches and indentations, and polish the cabinet; that the result was unsatisfactory, and another employe came and repolished the cabinet, making its surface bright, shiny and oily; that plaintiff was notified that it was not satisfactory and agreed to make a further inspection, but did not; that thereafter when plaintiff demanded the first payment defendant advised plaintiff of his willingness and readiness to make the same provided a phonograph like that selected was delivered; that thereafter defendant notified plaintiff that he did not desire to keep the phonograph so delivered and insisted upon delivery of one of the description purchased; that plaintiff refused to make such delivery, and refused to accept back the one delivered; that defendant offered to return the one delivered on return of the money he had paid on it. The court ruled that the evidence was inadmissible. No further testimony was offered and a verdict for plaintiff was directed.

The only point raised on this appeal is as to the admissibility of the offered evidence.

Replevin is a possessory action, and only the question of the right to possession is involved. In his affidavit of merits Newschine denied unlawful detention, alleged that he had purchased by sample, and made a payment thereon, that the phonograph delivered was damaged and not in accordance with the sample, and that plaintiff refused to return the money paid or carry out the contract of purchase. Except as to the claim of unlawful detention, which defense was not maintained in view of appellant's default and the provision of the mortgage for taking possession on such default,

14. The testimony was offered and a verdict for plaintiff was returned.

none of the defenses so made is appropriate in an action of replevin. But the judgment herein for plaintiff does not preclude the purchaser from a suit predicated upon his claim of breach of contract. (Fairbanks v. Malloy, 16 Ill. App. 277.) If defendant did not get the phonograph he selected and which plaintiff agreed to sell, and plaintiff refused to replace it with another phonograph, and defendant promptly rescinded the contract he might recover back the payments made on the purchase in another form of action. (Hove Machine Co. v. Billie, 85 Ill. 333.) But in this form of action there was no error in rejecting the offered evidence, and there being no evidence tending to controvert plaintiff's right to possession under the terms of the mortgage, the judgment is affirmed.

AFFIRMED.

Gridley and Wells, JJ., concur.

JOSEPH E. DAVIDSON,
Appellant,

v.

J. C. HEWAR,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

On reopening a judgment by confession against defendant for \$180 for rent alleged to be due for the months of March and April, the last two months of the lease, and on trial before the court of the issues raised by defendant's affidavit, the former judgment was vacated and a judgment for costs rendered herein for defendant.

Said affidavit of merits sets up that defendant refused to pay the rent for the month of February, 1926, until sufficient heat was furnished, and that plaintiff said that if he would pay for the month of February and move before March he would be released from the lease; accordingly he paid for the month of February on February 7th and vacated the apartment the same day.

Defendant's testimony was that the conversation and agreement with regard to the release was had with the father of plaintiff, and that he complained of the insufficiency of the heat in November, 1925, and that he started to complain about the heat in April, 1926. Davidson's father, who collected the rent - but was not shown to have had authority to cancel the lease or release the lessee, - testified to the effect that he had no conversation with defendant about heat during the winters of 1925 and 1926, and did not release him from the lease, and that defendant said he was

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UNIT OF CHIEF

THE UNITED STATES

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

On September 1, 1944, a judgment was rendered against defendant for the sum of \$100.00, and the sum of \$100.00 was paid to the plaintiff. The judgment was rendered by the court, and the sum of \$100.00 was paid to the plaintiff. The judgment was rendered by the court, and the sum of \$100.00 was paid to the plaintiff.

The plaintiff, who is a citizen of the United States, and the defendant, who is a citizen of the United States, have entered into a contract. The contract was made on the 1st day of January, 1944, and the sum of \$100.00 was paid to the plaintiff. The contract was made on the 1st day of January, 1944, and the sum of \$100.00 was paid to the plaintiff.

Defendant's testimony was that the contract was made on the 1st day of January, 1944, and the sum of \$100.00 was paid to the plaintiff. The contract was made on the 1st day of January, 1944, and the sum of \$100.00 was paid to the plaintiff. The contract was made on the 1st day of January, 1944, and the sum of \$100.00 was paid to the plaintiff.

moving because he did not have enough room for his increased family. Emma Davidson testified that she called up defendant after he moved out and asked him about the rent, and he said he was good for it and would pay it. In rebuttal defendant denied making such a promise. It appears that a new radiator was put into his apartment in the fall of 1924, and while there was proof that it did not furnish sufficient heat it appears that defendant remained in the apartment and paid rent therefor after the installation in the fall of 1924 until he left in February, 1926.

We think the evidence was insufficient to warrant the court in vacating the former judgment. The burden of proving a surrender and acceptance rested upon defendant as an affirmative defense. (Thompson v. Western Casket Co., 219 Ill. App. 134; Scanlan v. Heerth, 151 id. 532.) There was no proof that plaintiff ever consented to or authorized a release. Authority to collect rent does not carry with it the power to cancel the lease. (Scanlan v. Heerth, *supra*.)

Presumably the proof with regard to insufficient heat was offered on the theory of a constructive eviction, but if so, defendant was estopped by continuing in possession of the premises as aforesaid and continuing to pay rent therefor. (Grout v. Isham, 70 Ill. App. 102; Herfurth v. Corigan, 207 Ill. App. 140; Meyers v. Johnson, 136 Ill. App. 37.)

We are constrained to hold that the court erred in finding the issues for defendant and entering a judgment against plaintiff for costs. Accordingly the judgment is reversed with findings of fact and a judgment for \$180 in favor of appellant will be entered in this court.

REVERSED AND JUDGMENT HERE WITH
FINDINGS OF FACT.

Gridley and Wells, JJ., concur.

... because he did not have enough room for his insurance
policy. When Davidson testified that she called up Davidson
after he moved out and asked him about the rent, and he said he
was glad for it and would pay it. In repeated statements made
during such a period. It appears that a new tenant was put
into his apartment in the fall of 1936, and while there was proof
that he was furnished with a key it appears that Davidson
remained in the apartment and paid rent thereafter after the in-
stitution in the fall of 1936 until he left in February, 1937.
We think the evidence was insufficient to warrant the
court in setting aside the former judgment. The burden of proving a
mistake and consequences thereof upon Davidson as an attorney
before. (See Davidson v. Davidson, 122 Ill. App. 104.)
Davidson v. Davidson, 122 Ill. App. 104. There was no proof that David-
son was connected to an unauthorized release. Authority to
release that does not carry with it the power to remove the same.
(See Davidson v. Davidson, 122 Ill. App. 104.)
Presumably the proof with regard to Davidson's hand
was offered on the theory of a constructive release, but it so,
testimony was supported by continuing in possession of the premises
as attorney and concerning to pay rent thereafter. (See Davidson v.
Davidson, 122 Ill. App. 104. See Davidson v. Davidson, 122 Ill. App. 104.)
Davidson v. Davidson, 122 Ill. App. 104.
We are constrained to hold that the court erred in finding
the same. The evidence was sufficient to warrant a judgment against Davidson
for costs. Accordingly the judgment is reversed with finding of
fact and a judgment for \$100 in favor of Davidson will be entered
in this court.
REVEREND AND HONORABLE JUSTICE WITH
VICTIMS IN CASE.
-1937 and 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 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300 - 31911

FINDINGS OF FACT.

We find that there was no agreement between appellant and appellee for the release of appellee from his obligation to pay rent for the months of March and April, 1926, according to the terms of his lease, and that appellee was not released from his obligation to pay rent thereunder for the months of March and April, 1926.

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15 - 31271

STANLEY SHINKUS, administrator
of the estate of FRANK MILEWSKI,
deceased,

Defendant in Error.

v.

ANTON MARTINKUS,

Plaintiff in Error.

ERROR TO MUNICIPAL

COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action of the first class in assumpsit, tried before the court without a jury, there was a finding and judgment for \$2300 against defendant on June 2, 1926, and this writ of error was sued out.

In his original statement of claim, filed December 3, 1925, plaintiff alleged that, during the life time of said Milewski, defendant became indebted to Milewski in the sum of \$2500, and to evidence the debt gave his "note" for \$2300, and also a check for \$200, which was dishonored; that the note and check are now in the possession of defendant, or some one for him; and that since Milewski's death defendant has admitted the indebtedness to the former's estate in the sum of \$2500, but claims a set-off of \$750, of which plaintiff has no knowledge.

In defendant's affidavit of merits he denied each and all of the above allegations, and further alleged that during Milewski's lifetime he and Milewski were co-partners, doing business as the Chicago Clothing Co., at No. 2535 West 83rd Street, Chicago; that the co-partnership suffered such severe losses that the business had to be sold and was sold for \$5627; that its indebtedness was more than \$8178; that in order to pay its creditors and avoid bankruptcy

2471A.020

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STATE OF NEW YORK IN SENATE January 10, 1911.	REPORT OF THE COMMISSIONER OF THE LAND OFFICE IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE MAY 1, 1909.
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THE COMMISSIONER OF THE LAND OFFICE

IN AN ACTION OF THE FIRST CLASS IN REMEDY, tried before the court without a jury, there was a finding and judgment for \$1000 against defendant on June 1, 1908, and this was the only one made out.

In his original statement of claim, filed December 2, 1905, plaintiff alleged that, during the life term of said Milwaukee, defendant became indebted to plaintiff in the sum of \$2000, and so evidence the fact that the "note" for \$1000, and also a check for \$1000, which was dishonored; that the note and check are now in the possession of defendant, or some one for him; and that since Milwaukee's death defendant has admitted the indebtedness to the former's estate in the sum of \$2000, but claims a set-off of \$1000, of which plaintiff has no knowledge.

In defendant's affidavit of denial he denied each and all of the above allegations, and further alleged that during Milwaukee's lifetime he and Milwaukee were co-partners, doing business as the Chicago Clothing Co., at No. 1235 West 42nd Street, Chicago; that the co-partnership entered upon several years before the business was to be sold and was sold for \$1000; that the indebtedness was more than \$1000; that in order to pay the creditors and avoid bankruptcy

defendant was compelled to borrow money, and did so, and paid the creditors; and that Milewski, during his lifetime, never accounted with defendant for his share of the losses.

At the conclusion of the trial, during which many witnesses testified, and before the finding and judgment were entered, plaintiff, by leave of court, filed an amended statement of claim in which the first two sentences of the original statement were amended so as to read substantially as follows: That during Milewski's lifetime he "loaned or advanced" to defendant \$2300, which sum was evidenced by a "receipt"; that subsequently Milewski loaned the further sum of \$200 to defendant, for which the latter gave him a check which was returned dishonored; and that said "receipt and check" cannot be obtained by plaintiff because they are in the possession of defendant or some one for him. And the court ordered that defendant's affidavit of merits, previously filed, stand as such to plaintiff's amended statement of claim.

The alleged receipt and check were not introduced in evidence. While there was testimony to the effect that a receipt and a check, bearing defendant's signatures, were seen in the hands of defendant's daughter, Mrs. Anna Mureika, during an evening in March, 1925, just before or just after Milewski's death, she denied ever having in her possession any such instruments. It was shown by a clear preponderance of the evidence, however, that in November or December, 1923, Milewski became a partner with defendant in a clothing business, known as said Chicago Clothing Co.; that Milewski purchased a one-half interest in the business from defendant and agreed to pay \$3,000 therefor, which sum was to be added to the assets of the business; that, to apply on the purchase Milewski made two cash payments, aggregating \$2,300, and defendant gave him a receipt therefor in the name of the

defendant was compelled to borrow money, and that he, and said the
defendant, and said witness, having his lifetime, never received
with defendant for his share of the money.
At the conclusion of the trial, having been many witnesses
called, and before the finding and judgment were entered, plaintiff
by leave of court, filed an amended statement of claim in which
the first two paragraphs of the original statement were amended so
as to read substantially as follows: That during defendant's life-
time he "issued or advanced" to defendant \$1200, which was
advanced by a "receipt"; that subsequently defendant issued the
first sum of \$800 to defendant, for which the latter gave him
check which was returned dishonored; and that said "receipt" and
check cannot be obtained by plaintiff because they are in the
possession of defendant or some one for him, and the same returned
that defendant's affidavit of service, previously filed, stand as
such as plaintiff's amended statement of claim.
The alleged receipt and check were not introduced in
evidence. Also there was testimony to the effect that a receipt
and a check bearing defendant's signature, were seen in the home
of defendant's daughter, Mrs. Anna Manning, during an evening in
March, 1922. Just before or just after defendant's death, she denied
ever having in her possession any such instruments. It was shown
by a clear preponderance of the evidence, however, that in November
or December, 1921, defendant became a partner with defendant in a
certain business, known as said Chicago Cleaning Co.; that
defendant purchased a one-half interest in the business from
defendant and agreed to pay \$5,000 therefor, which sum was to
be added to the assets of the business; that, as a part of the
purchase defendant made two cash payments, aggregating \$2,500,
and defendant gave him a receipt therefor in the name of the

Clothing Co.; that Milewski did not pay the balance of \$700, but, from the time he made said payments until shortly before the business was sold out early in March, 1925, he acted as a partner in the business, drew out money from the firm's funds regularly for living expenses, and was recognized as a partner by customers of the firm and others; that, when it became apparent that the business was not profitable and was suffering continued losses, Milewski urged that it be sold to prevent further losses; that defendant finally sold out the business for something more than \$5,000, and, with this money and with other funds of his own, paid or liquidated the firm's indebtedness to the bank and others, aggregating over \$8,000; and that Milewski, before he died because of injuries received in an accident, did not contribute his share of the losses. The evidence also clearly showed that plaintiff's demand is one arising out of a copartnership transaction, and that an accounting never was had concerning the affairs thereof between defendant and Milewski, prior to his death, or his legal representative after his death.

It is a well settled rule that an action at law will not lie in favor of one partner, or his representative, against a copartner, or his representative, upon a demand growing out of a partnership transaction until there has been a settlement of accounts and a balance struck; and that this rule prevails even after a dissolution of the firm, so long as there has been no settlement or accounting between the partners. (15 Ency. Pl. & Prac. pp. 1005-8; Lavenport v. Gear, 2 Scam. 495, 496; Frink v. Ryan, 3 Scam. 322, 326; Milligan v. MacKinlay, 209 Ill. 358, 360.) We are, therefore, of the opinion that the entry of the judgment in question against defendant was improper and must be reversed.

REVERSED WITH FINDING OF FACTS.

Barnes, P. J., and Wells, J., concur.

Plaintiff: 50-1 that Milwaukee did not pay the balance of \$700, but
 from the time he made said payments until shortly before the
 business was sold out early in March, 1928, he acted as a partner
 in the business, drew out money from the firm's funds regularly for
 living expenses, and was recognized as a partner by customers of
 the firm and others; that, when it became apparent that the business
 was not profitable and was suffering continuing losses, Milwaukee
 agreed that it be sold to prevent further losses; that defendant
 finally sold out the business for something more than \$2,000, and
 with this money and with other funds of his own, paid or liquidated
 the firm's indebtedness to the bank and others, aggregating over
 \$5,000; and that Milwaukee, before he sold business of interest re-
 sulted in no interest, did not contribute his share of the losses.
 The witness also stated that plaintiff's claim is one
 arising out of a partnership transaction, and that an accounting
 party was had concerning the affairs thereof between defendant and
 Milwaukee, prior to his death, on his legal representative after
 his death.
 It is a well settled rule that an action at law will not
 lie in favor of one partner, or his representative, against a co-
 partner, or his representative, upon a demand growing out of a
 partnership transaction until there has been a settlement or
 account and a balance struck; and that this rule prevails even after
 dissolution of the firm, so long as there has been no settlement
 or accounting between the partners. (15 Mich. 2d. 470, 100-
 21, 202; William v. Milwaukee, 203 Ill. 208, 209.) It was there-
 fore, at the opinion that the entry of the judgment in question
 against defendant was improper and must be reversed.
 REVEREND WITH WITNESS BY JUDGE.
 James, J. J. and John, J.

15 - 31271

FINDING OF FACTS.

We find as facts in this case that plaintiff's demand grows out of a copartnership transaction, which copartnership existed between plaintiff's intestate, Milewski, and defendant, and that during Milewski's lifetime there was no settlement of accounts or an accounting between him and defendant as to said copartnership affairs, and that since his death there has not been any settlement of said affairs, or any accounting thereof, between his legal representative, plaintiff, and defendant.

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STATE OF NEW YORK

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JOSEPH SIEGEL,
Appellant,

v.

SAMUEL RUDIKOFF and
MINNIE RUDIKOFF,
Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE GRIBLEY DELIVERED THE OPINION OF THE COURT.

On February 25, 1926, in a mechanic's lien proceeding instituted by Joseph Siegel on April 14, 1920, to enforce the payment of \$365 for certain claimed extra work, the court, following the recommendation of the master to whom the cause was referred, entered a decree dismissing complainant's bill for want of equity, taxed the costs against complainant, and ordered that the defendant, Samuel Rudikoff, have judgment as at common law against complainant for the sum of \$296.95, being the master's and stenographer's fees which had been paid by Rudikoff. Complainant appealed.

In the year 1919, Samuel Rudikoff and Minnie Rudikoff, his wife, were the owners in joint tenancy of the improved premises in question, located at 3835 West Polk Street, Chicago. On November 8, 1919, Samuel Rudikoff, as first party, with the knowledge and consent of Minnie Rudikoff, entered into a written contract with complainant, a building contractor, second party, whereby the latter, for the agreed consideration of \$1200 (plus one-half the cost of certain mentioned electric fixtures), was to do certain enumerated work in repairing the two-story residence on the premises and changing it into a two-apartment building. Siegel agreed among other things to complete all the work in twenty working days after being given possession of the

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1911 - 1912

LOCAL COURT
Appeals

APPEAL FROM
COURT OF COMMONS
COOK COUNTY

APPEAL FROM
COURT OF COMMONS
COOK COUNTY

MR. JUSTICE GILBERT DELIVERED THE OPINION OF THE COURT.

IN FEBRUARY 22, 1908, in a judgment of the court

entered by Judge Gillet on April 14, 1908, to enforce the
payment of \$500 for certain claimed extra work, the court, follow-
ing the recommendation of the master in which the same was
referred, entered a decree dismissing complainant's bill for work
of equity, found the costs against complainant, and ordered that
the defendant, Samuel Washburn, have judgment as at common law
against complainant for the sum of \$250.00, being the master's
and stenographer's fees which had been paid by Washburn. Com-
plainant appealed.

In the year 1910, Samuel Washburn and Minnie Washburn,
his wife, were the owners in joint tenancy of the improved premises
in question, located at 3325 West 10th Street, Chicago. On
November 8, 1910, Samuel Washburn, as first party, with the
knowledge and consent of Minnie Washburn, entered into a written
contract with complainant, a building contractor, second party,
whereby the latter, for the agreed consideration of \$1200 (plus
one-half the cost of certain material supplied by him), was to
do certain enumerated work in repairing the two-story residence
on the premises and changing it into a two-story building.
Stipulations among other things to complete all the work in
twenty working days after being given possession of the

building, to pay for all labor and materials furnished by any sub-contractors, and to deliver back the building to the Rudikoffs free and clear of all mechanic's lien claims. It was mutually agreed that said consideration should be paid in installments, each installment to represent 30 per cent of the value of the labor and materials then incorporated into the building, and that final payment should be made within 10 days after the work was fully completed to the satisfaction of Rudikoff and after delivery to him of waivers and releases of all liens. The work was not completed within the stipulated time nor to the satisfaction of Rudikoff, and litigation followed. In March, 1920, Rudikoff and wife, as plaintiffs, commenced a suit at law in the County court of Cook county, Case No. 43842, against Siegel, claiming an indebtedness of \$1,000. The original declaration was filed on April 2, 1920, and the suit was predicated on the theory that Siegel had failed to complete the work called for by the contract, and that plaintiffs were obliged to have it completed by other parties at great expense for which they were entitled to be reimbursed. Shortly after its commencement Siegel, on April 14, 1920, filed the present bill against the Rudikoffs to enforce a claimed mechanic's lien upon the premises solely for certain extra work claimed to have been done upon the building. In the bill, after referring to the making of said written contract, it is alleged that thereafter Samuel Rudikoff, with the knowledge and permission of his wife, entered into a verbal contract with Siegel, whereby the latter agreed to do and perform certain extra work not included in said written contract; that said extra work was fully performed and completed on March 12, 1920; and that the reasonable value of the same was \$865. The claimed extras are itemized in the bill as follows: For enlarging rear

porch and rear bedroom and building an addition to roof, \$400; for new electric wiring, \$350; for papering, \$35; for installing a plate rail and two radiators in dining room, \$40; for building new opening for a door in the kitchen on the second floor, \$40; total \$865. On May 24, 1920, the defendants, the Rudikoffs, filed their joint and several answer, attaching thereto as an exhibit said written contract of November 8, 1919, and alleging in substance that they had not made any verbal contract with Siegel for any extra work and that such work as was done had been done solely under said written contract and was included therein. It does not appear from the record that, for a period of nearly five years after the filing of said answer, Siegel made any attempt to put said mechanic's lien cause at issue, and the same was not at issue when, on May 9, 1925, said defendants by leave of court filed an amendment (hereinafter mentioned) to their said answer. On September 21, 1925, the cause, being then at issue, was referred to a master to take proofs and report his conclusions.

In the meantime there had been some considerable activity in the suit at law in the County court, as appears from said master's report, filed February 23, 1926, and from documentary evidence introduced before him, and from the records of this appellate court. To plaintiffs' amended declaration Siegel, on April 30, 1921, filed various pleas, including a plea of set-off. In his bill of particulars as to the set-off he claimed a total of \$1240 due him from Samuel Rudikoff, - viz, \$375 for a balance on said written contract of November 8, 1919, and \$865 for extra work done upon the building. The claim for extras was itemized the same as in the present bill for lien. Although the present record does not disclose that Minnie Rudikoff formally was dismissed as one of the plaintiffs in said suit at law, it

...and rear bedroom and hallway in addition to rest, \$4000;
for new electric wiring, \$2500; for repainting, \$500; for installing
a glass wall and two windows in dining room, \$400; for painting
new opening for a door in the kitchen on the second floor, \$400;
total \$6800. On May 22, 1933, the defendant, the Washington, filed
their joint and several answer, attaching thereto as an exhibit
said written contract of November 8, 1919, and alleging in sub-
stance that they had not made any verbal contract with Wiley for
any extra work and that such work as was done had been done solely
under said written contract and was included therein. It does not
appear from the record that for a period of nearly five years
after the filing of said answer, Wiley made any attempt to pay
said defendant's lien claim as shown, and the same was not at issue
when, on May 3, 1933, said defendant by leave of court filed an
amendment (hereinafter mentioned) to their said answer. On
September 21, 1933, the cause, being then at issue, was referred to
a master to take proofs and report his conclusions.
In the meantime there had been some considerable activity
in the suit at law in the County court, as appears from said
master's report, filed February 25, 1934, and from documentary
evidence introduced before him, and from the records of said
appellate court. To plaintiff's amended declaration Wiley, on
April 20, 1933, filed various pleas, including a plea of not-est.
In his bill of particulars as to the not-est he claimed a total
of \$1000 due him from Samuel Washington, - viz, \$500 for a balance
on said written contract of November 8, 1919, and \$500 for work
done upon the building. The claim for money was limited
the same as in the present bill for law. Although the present
record does not disclose that William Washington formally was
dismissed as one of the plaintiffs in said suit at law, it

sufficiently appears that the parties theretotreated the suit as one in which Samuel Rudikoff was sole plaintiff. On June 7, 1921, after leave of court obtained, he filed in the suit an additional count to the declaration, entitled Samuel Rudikoff v. Joseph Siegel, in which, after setting forth said written contract in habeo verba, he alleged in substance that, although he had made partial payments to Siegel aggregating \$850, Siegel had failed and refused to complete the work on the building according to the contract and as a result he had been obliged to employ others to complete the work to his damage in the sum of \$1,000, etc. After similar pleas, including that of the claimed set-off, had been filed to the additional count there was a trial in the County court in June, 1921, resulting in a verdict for Rudikoff for \$536. In September, 1921, judgment was entered for that amount against Siegel and he appealed to this appellate court, where on October 30, 1922, the judgment was reversed and the cause remanded. (Case No. 27,635.) The suit at law again was tried in the County court before a jury in April, 1925, resulting in a verdict for Rudikoff for \$913. He remitted \$310 and judgment was entered on April 18, 1925 in his favor and against Siegel for \$603. Siegel again appealed to this appellate court, where on June 14, 1926, the judgment was affirmed (Case No. 30, 594.)

In the said amendment, filed by leave of court on May 9, 1925, to said answer of the Rudikoffs to the present bill, they alleged in substance that the claim of complainant (Siegel) for a lien for extras amounting to \$865, is the same claim for extras which he set forth in his plea of set-off in said suit at law, and that on April 18, 1925, Samuel Rudikoff recovered a judgment for \$603 against Siegel in said suit at law, which judgment remains in full force and effect. On the hearing before the master considerable

testimony was introduced as to Siegel's claim for extras. The defendants introduced properly certified copies of the pleadings, orders and said final judgment for \$603 in favor of Samuel Rudikoff in said suit at law, and argued that the same precluded any recovery by Siegel in the present mechanic's lien cause for his alleged claim for extras, and upon the ground of res adjudicata or estoppel by verdict. The master in his report found inter alia that all the items, claimed for extra work, as contained in Siegel's plea of set-off in said suit at law, "were the same as now claimed by him," and that the subject matter of the present mechanic's lien case "was determined and adjudicated in said County court adversely to the complainant, Siegel," and the master recommended that complainant's bill be dismissed for want of equity. The Superior court overruled all exceptions to the master's report, and entered the decree appealed from, as first above mentioned.

After reviewing the present record we are of the opinion that the Court was fully warranted in dismissing for want of equity Siegel's bill (wherein he sought to enforce his claimed mechanic's lien for extra work amounting to \$865) upon the doctrine of estoppel by verdict. In said suit at law in the County court, Case No. 43,842, wherein Siegel was the defendant, he pleaded by way of set-off to Rudikoff's claim that the latter was indebted to him in the sum of \$865 for the same extra work as is the subject matter of the present bill, and, upon the second trial of said suit at law, the issues therein (both as to Rudikoff's claim and Siegel's claim of set-off) were decided adversely to Siegel by the jury's verdict, upon which a final judgment for \$603 was entered against him on April 18, 1925, and subsequently affirmed by this appellate court. In Hanna v. Bead, 102 Ill. 596, 602, it is said: "Where some specific fact or question has been adjudicated and determined

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

The above information was obtained from the files of the FBI, New York Office, dated 10/10/68.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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...and he said a "friend" of his, one of those who are not friends, was

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2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349 2350 2351 2352 2353 2354 2355 2356 2357 2358 2359 2360 2361 2362 2363 2364 2365 2366 2367 2368 2369 2370 2371 2372 2373 2374 2375 2376 2377 2378 2379 2380 2381 2382 2383 2384 2385 2386 2387 2388 2389 2390 2391 2392 2393 2394 2395 2396 2397 2398 2399 2400 2401 2402 2403 2404 2405 2406 2407 2408 2409 2410 2411 2412 2413 2414 2415 2416 2417 2418 2419 2420 2421 2422 2423 2424 2425 2426 2427 2428 2429 2430 2431 2432 2433 2434 2435 2436 2437 2438 2439 2440 2441 2442 2443 2444 2445 2446 2447 2448 2449 2450 2451 2452 2453 2454 2455 2456 2457 2458 2459 2460 2461 2462 2463 2464 2465 2466 2467 2468 2469 2470 2471 2472 2473 2474 2475 2476 2477 2478 2479 2480 2481 2482 2483 2484 2485 2486 2487 2488 2489 2490 2491 2492 2493 2494 2495 2496 2497 2498 2499 2500 2501 2502 2503 2504 2505 2506 2507 2508 2509 2510 2511 2512 2513 2514 2515 2516 2517 2518 2519 2520 2521 2522 2523 2524 2525 2526 2527 2528 2529 2530 2531 2532 2533 2534 2535 2536 2537 2538 2539 2540 2541 2542 2543 2544 2545 2546 2547 2548 2549 2550 2551 2552 2553 2554 2555 2556 2557 2558 2559 2560 2561 2562 2563 2564 2565 2566 2567 2568 2569 2570 2571 2572 2573 2574 2575 2576 2577 2578 2579 2580 2581 2582 2583 2584 2585 2586 2587 2588 2589 2590 2591 2592 2593 2594 2595 2596 2597 2598 2599 2600 2601 2602 2603 2604 2605 2606 2607 2608 2609 2610 2611 2612 2613 2614 2615 2616 2617 2618 2619 2620 2621 2622 2623 2624 2625 2626 2627 2628 2629 2630 2631 2632 2633 2634 2635 2636 2637 2638 2639 2640 2641 2642 2643 2644 2645 2646 2647 2648 2649 2650 2651 2652 2653 2654 2655 2656 2657 2658 2659 2660 2661 2662 2663 2664 2665 2666 2667 2668 2669 2670 2671 2672 2673 2674 2675 2676 2677 2678 2679 2680 2681 2682 2683 2684 2685 2686 2687 2688 2689 2690 2691 2692 2693 2694 2695 2696 2697 2698 2699 2700 2701 2702 2703 2704 2705 2706 2707 2708 2709 2710 2711 2712 2713 2714 2715 2716 2717 2718 2719 2720 2721 2722 2723 2724 2725 2726 2727 2728 2729 2730 2731 2732 2733 2734 2735 2736 2737 2738 2739 2740 2741 2742 2743 2744 2745 2746 2747 2748 2749 2750 2751 2752 2753 2754 2755 2756 2757 2758 2759 2760 2761 2762 2763 2764 2765 2766 2767 2768 2769 2770 2771 2772 2773 2774 2775 2776 2777 2778 2779 2780 2781 2782 2783 2784 2785 2786 2787 2788 2789 2790 2791 2792 2793 2794 2795 2796 2797 2798 2799 2800 2801 2802 2803 2804 2805 2806 2807 2808 2809 2810 2811 2812 2813 2814 2815 2816 2817 2818

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in a former suit, and the same fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit, if properly presented and relied on, will be held conclusive upon the parties in the latter suit, without regard to whether the cause of action is the same in both suits or not. This species of estoppel is known to the law as an estoppel by verdict, and is equally available to a plaintiff in support of his action, when the circumstances warrant it, as when offered by a defendant as matter of defense. * * Whether the adjudication relied on as an estoppel goes to a single question, or all the questions involved in a cause, the fundamental principle upon which it is allowed in either case is, that justice and public policy alike demand that a matter, whether consisting of one or many questions, which has been solemnly adjudicated by a court of competent jurisdiction, shall be deemed finally and conclusively settled in any subsequent litigation between the same parties, where the same question or questions arise, except where the litigation is a direct proceeding for the purpose of reversing or setting aside such adjudication." (See, also, Attorney General v. Chicago and E. R. Co., 112 id. 520, 539; Wright v. Griffey, 147 id. 496, 499; Reynolds v. Mandel, 175 id. 615, 618.) And we do not think that there is any merit in the contention of Siegel's counsel that the doctrine is not applicable in the present case because the parties are not the same in the two suits. While it is true that in the suit at law in the County court Siegel claimed that Samuel Rudikoff alone was indebted to him for said extra work because of a verbal contract made between Siegel and Rudikoff, and in the present lien suit Rudikoff's wife (owning the premises in joint tenancy with him) is joined with him as a defendant, still the basis of Siegel's claim in each case is the alleged verbal contract made between him and Rudikoff alone. In Hanna v. Read,

in a former suit, and the same fact of causation is again set in
- fact in a subsequent suit between the same parties, its deter-
- mination in the former suit, if properly presented and relied on,
will be held conclusive upon the parties in the latter suit.
without regard to whether the cause of action in the same is held
to be the same or not. This question of res judicata is known to the law as an
estoppel by verdict, and its generally conclusive effect as a plaintiff in
support of his action, when the circumstances warrant it, is shown
affirmed by a defendant as matter of defense, &c. Whether the
estoppel is relied on as an estoppel in fact or as a legal conclusion,
or all the questions involved in a cause, the fundamental principle
upon which it is allowed in either case is, that justice and public
policy alike demand that a matter, whether consisting of one or
many questions, which has been solemnly adjudicated by a court of
competent jurisdiction, shall be deemed finally and conclusively
settled in any subsequent litigation between the same parties,
where the same question or questions arise, except where the
litigation is a direct proceeding for the purpose of reviewing or
setting aside such adjudication." (See, also, Wheeler v. Wheeler, 107
Ill. 495; Wheeler v. Wheeler, 178 Ill. 418, 419, and see also
and think that there is no doubt in the confusion of Wheeler's
statement that the doctrine is not applicable in the present case
between the parties and that the same in the two suits. While it
is true that in the suit in the County Court legal issues
were raised which were not raised in the suit in the Circuit Court,
because of a factual connection made between legal and equitable,
in the present case and Wheeler's suit, because the parties in
both suits were the same, it is clear that the same is a legal issue,
the basis of Wheeler's claim in each case is the alleged verbal
contract made between him and Wheeler's claim, in Wheeler v. Wheeler.

supra, page 608, it is said: "It is sufficient for the purposes of the rule relating to a former adjudication, when relied on as an estoppel, that the parties be substantially the same."

Counsel for Siegel further contend in substance that, after the entry of the judgment for \$603 in said suit at law on April 18, 1935, if the Rudikoffs intended to rely upon Siegel's plea of set-off and upon the verdict and judgment in said suit as a bar to the present mechanic's lien proceeding, they should properly have pleaded the facts by a cross-bill instead of by an amendment to their answer. In support of his contention counsel refers to Jenkins v. International Bank, 111 Ill. 462, where the Court in its opinion (p. 470), citing Story's Equity Pleading, sec. 393, says: "With respect to a matter of defence, which arises after the cause is at issue, it is laid down that the defendant can not avail himself of the defence by plea or answer, but must make the same the subject of a cross-bill." A sufficient answer to the contention is, we think, that when the Rudikoff's filed the amendment to their answer, the cause was not at issue. Furthermore, the amendment gave sufficient notice to Siegel that defendants intended to rely upon said verdict and judgment as a bar to any recovery by Siegel in the present lien proceeding.

Nor do we think, after reviewing the entire record and particularly the proceedings before the master, that the court erred in taxing against complainant the master's and stenographer's fees, aggregating \$296.95. We do not find that this amount is excessive.

For the reasons indicated the decree of the Superior court is affirmed.

AFFIRMED.

Barnes, P. J., and Wells, J., concur.

[illegible]

373 - 31505

LEWIS A. BAIN, doing business
as L. A. Bain & Co.,
Complainant and Appellee,

v.

GLOBE LAUNDRY COMPANY,
a corporation, CHICAGO TRUST
COMPANY, a corporation,
individually and as trustee,
and the unknown owners of
certain notes,
Defendants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

On appeal of GLOBE LAUNDRY COMPANY,
Appellant.

MR. JUSTICE GRIBLEY DELIVERED THE OPINION OF THE COURT.

By this appeal it is sought to reverse a decree of the circuit court, in favor of complainant, entered May 3, 1926, in a mechanic's lien proceeding.

In the decree the court, after confirming the master's report and making many findings, adjudged that, unless the defendants cause to be paid to complainant within three days the sum of \$2839.69, with five per cent interest thereon from August 19, 1924, together with the costs of the suit including master's fees and expenses of \$286.45, the premises involved be sold, etc., subject, however, to the lien of a certain trust deed running to the Chicago Trust Company, as trustee, dated December 7, 1923, and recorded shortly thereafter as Document No. 8,221,483.

Complainant's bill, filed November 5, 1924, sought the foreclosure of the claimed lien for furnishing and installing in the new building upon the premises certain "finishing" plumbing materials. Complainant furnished an estimate on May 7, 1924, to

G. T. Luckow, president of the Globe Laundry Co., and started the work during the latter part of June, 1924, and fully completed the same on August 19, 1924. He was not paid anything for this "finishing" work. Early in the summer of 1923, Luckow, then the owner of the land, arranged for the erection thereon of the building to be used by the Globe Laundry Co. in connection with its laundry business, and in August he made a verbal arrangement with complainant whereby the latter was to do the "roughing in" plumbing work, according to the plans made by Luckow's architect, on a time and material basis plus a reasonable allowance to complainant for his overhead expense and his profit. Nothing was said at the time as to what per cent of the cost of the work should be allowed for said overhead expense and profit, further than that complainant (who had done considerable plumbing work for Luckow in preceding years) said he would not overcharge Luckow. After procuring a copy of the plans, complainant started in upon the work and fully completed the same in March, 1924. As the work progressed he received payments on account, and he was finally paid in full for said roughing in work - the last payment being received on May 10, 1924. The payments aggregated \$9,638.78.

The errors assigned by counsel for the Laundry Co., as we view them, involve the decision by us of only two questions, viz, (1) Was the work of complainant - the "roughing in" work and the "finishing" work done under and by virtue of two distinct contracts or only one? (2) If there were two contracts made and two distinct jobs done, does the fact that complainant signed and delivered, during January, 1924, two waivers of lien prevent his maintaining a lien for the work he did and the materials he furnished under the finishing contract or job?

E. I. Jackson, President of the House January 1934, and stated the
 work during the latter part of 1933, 1934, and 1935, regarding the
 same on August 12, 1935. He was not quite certain for this "think-
 ing" work. With in the summer of 1934, Jackson, from the work of
 the last, arranged for the creation of the National Council to be
 used by the House January 30. In connection with the January session,
 and in regard to work a verbal arrangement with congressional committee
 the latter set to do the "thinking in" connection with, according to
 the plans made by Jackson's committee, on a time and material basis
 give a reasonable allowance for his overhead expenses
 and his profit. Jackson was not at the time as to what was to be
 the cost of the work should be allowed for with overhead expenses
 and profit. Jackson had been told that the National Council had been
 planning work for Jackson in providing money, and he would not over-
 charge Jackson. After providing a copy of the plan, completed
 stated in upon the work and fully completed the same in March,
 1934. As the work progressed he received payments on account, and
 he was finally paid in full for work completed in work - the last
 payment being received on May 12, 1934. The payments aggregated
 \$2,425.75.
 The account rendered by Jackson for the January 30, 1934
 no view that, involve the inclusion by me of only two questions,
 viz., (1) Was the work of congressional - the "thinking in" work and
 the "thinking" work done under and by virtue of the National Coun-
 Council or only one? (2) If there were two separate work and two
 distinct jobs done, does the fact that congressional, signed and
 delivered, during January, 1934, two members of the House and his
 maintaining a lien for the work he did and the materials he fur-
 nished under the thinking contract of 1934

The following additional facts in substance are disclosed from the evidence: Under date of December 7, 1923, the Chicago Trust Co. (hereinafter called the Trust Co.) made a building loan to Luckow for \$100,000, as evidenced by the 19 notes of Luckow and wife, secured by their above mentioned trust deed. Under date of December 17, 1923, Luckow and wife conveyed the premises by warranty deed to the Laundry Co. This deed was recorded on April 22, 1924, as Document No. 8,377,954. While the roughing in work was progressing and complainant rendering statements or bills from time to time, the same were approved and paid by Luckow or the Laundry Co., or by the Trust Co. on account of said loan. At no time, with possibly one exception, was any question raised as to the charges for the work. Luckow once asked complainant how much above actual cost he was charging for overhead expense and profit and complainant replied "around fifteen and fifteen." This expression means among contractors that 15% for overhead expense and 15% for the contractor's profit are added to the cost of the labor and the cost of the materials. Prior to the time complainant received payment in full for the roughing in work he was not asked to furnish any itemized statements showing the actual cost of the labor and materials. Under date of January 1, 1924, - after complainant had been paid by Luckow \$3000 on account of said work, and at a time when complainant was seeking further payments on account through the Trust Co., complainant signed and delivered a waiver of lien, in the ordinary printed form, in which, after reciting that "L. A. Bain & Co." had been employed by Luckow to furnish "plumbing labor and material" for the building (giving its location), it is stated that "the undersigned, for and in consideration of one dollar and other good and valuable considerations, does hereby waive and release any and all lien, or claim, or

The following additional facts in connection are disclosed from the evidence: Under date of December 7, 1934, the Chicago Trust Co. (hereinafter called the Trust Co.) made a building loan to amount for \$100,000, as evidenced by the 10 notes of \$10,000 each, secured by their above mentioned trust deed. Under date of December 17, 1934, Jackson and wife conveyed the premises by warranty deed to the Chicago Co. This deed was recorded on July 14, 1934, as Document No. 2,177,984. Until the recording in said Chicago Co., or by the Trust Co. on account of said loan. At this time, the same were approved and paid by Jackson on the Chicago Co., as by the Trust Co. on account of said loan. At this time, with possible exception, was any question raised as to the charges for the work. Jackson was asked to explain the above stated cost he was charging for overhead expense and profit and accounting replied "around fifteen and fifteen." This expression means about fifteen percent for overhead expense and for the contractor's profit was added to the cost of the labor and the cost of the materials. After to the time of completion of the building in July for the recording in work he was not asked to furnish any itemized statement showing the actual cost of the labor and materials. Under date of January 1, 1935, after completion had been paid by Jackson \$1000 on account of said work and at a time when completion was seeking further payment on account through the Trust Co., completion signed and delivered a waiver of claim, in the ordinary printed form, in which after reciting that "A. A. Blair & Co." had been employed by Jackson to furnish "furnishing labor and material" for the building (which is incorrect), it is stated that "the undersigned, for and on behalf of said Blair and others and valuable contributions, have hereby waived and released and will limit, as claims, no

right of lien, on said above described building and premises * * on account of labor or materials, or both, furnished or which may be furnished by the undersigned to or on account of said G. T. Luckow for said building or premises." Under date of January 19, 1924, when complainant was seeking through the Trust Co. a further payment on account for the roughing in work and received it, and when Luckow was seeking to be reimbursed out of the moneys in the hands of the Trust Co. for the \$3,000 he had previously paid complainant, complainant signed and delivered another instrument, in which it is stated, after certain recitals concerning "plumbing and sewerage," that the undersigned does hereby waive and release "any and all lien or claim or right of lien in and to the premises, or the building or improvements thereon, * * on account of labor or materials, or both, furnished, to the extent of \$7,576.81, by the undersigned in connection with such work or otherwise."

Early in May, 1924, after complainant had fully completed his verbal contract for the roughing in work, and after he had been paid therefor (except a small final payment of \$162.85, which he received on May 10, 1924), Luckow, acting as president of the Laundry Co. (the then owner of the premises) requested complainant to furnish him with an estimate of what he would charge for the furnishing and installing of certain "finishing" plumbing materials. About this time Luckow had turned over to one Fred Boegershausen the work of supervising the further construction of the building. On May 7, 1924, complainant, complying with Luckow's request for such an estimate, wrote him a letter, which was introduced in evidence. After referring to Luckow's request that complainant "make a survey of the work in our line required in your laundry building * * in order to arrive at the approximate cost of completing same," the letter mentions in itemized form that

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various "finishing" materials of certain kinds and sizes should be installed, viz, wash sink, porcelain urinal, 21 lavatories, 19 closet outfits and 14 shower baths, and concludes: "The approximate cost for the labor and material for the above installations will be \$2875. We have not been advised by you as to the further extension of any six or four inch pipes which you may require in hot water tank heaters, roof tank connections, or washing machine connections, and accordingly these items are not included in this estimate." About June 1, 1924, Luckow requested complainant to see Boegershausen regarding certain changes in said estimate as to the character and kind of some of said finishing materials. Complainant did so and certain changes from the estimate were agreed upon at a slightly decreased total cost. On June 28, 1924, the Laundry Co., per Luckow as president, wrote complainant, calling attention to the fact that "only a very small part of the equipment has been delivered," viz, only "a couple of lavatories and a few toilet bowls," and directing complainant to "place the order for complete equipment at once" and that "the installation be made without any further delay." Thereafter complainant pushed this work and completed it, as above stated, on August 19, 1924. About August 6th he rendered a statement for the cost of said finishing work done during July, \$1325.57, and Luckow, though not objecting to the amount, said that he would not pay anything until the job was completed. During the latter part of August complainant rendered a second statement for work done in August and up to August 19th, \$1004.12. Subsequently Boegershausen requested that both of these statements, aggregating \$2329.69, be more particularly itemized. This complainant did, whereupon both Luckow and Boegershausen demanded that, before payment of the statements be made, complainant should render itemized statements of the cost of all labor and materials on the previously

completed roughing in work. Complainant refused to do this, taking the position that that work had been done under a separate contract, which contract had been fully completed and his bills therefor, not objected to, had been paid in full. No specific objections were made to the amounts of the bills rendered for said finishing work. Luckew testified: "I said to Bain I would not pay him any more bills unless he gave me an itemized statement showing labor and material" on the previously completed roughing in job.

After a review of the evidence, we think it clear that there were two separate and distinct contracts made - one for the "roughing in" work, which work was fully completed and complainant paid therefor, and the other for said "finishing" work. And we are also of the opinion that when, on January 1, and January 19, 1934, complainant signed and delivered said waivers of lien, it was the intention of all parties at the time that said waivers applied only to work done and to be done on the roughing in contract, which was the only contract then in existence, and that said waivers cannot, under the facts and circumstances in evidence, be treated as waivers of lien for said finishing work. This holding, we think, is in accord with the following authorities. Paulsen v. Manske, 126 Ill. 72, 79 (cited with approval in Turner v. Brenckle, 249 Ill. 394, 400); Pagnacco v. Faber, 221 Pa. St. 326; Shropshire v. Luncan, 25 Neb. 485, 488; Phillips on Mechanics' Liens (2nd Ed) Sec. 273.

For the reasons indicated the decree of the circuit court is affirmed.

AFFIRMED.

Barnes, P. J., and Wells, J., concur.

PEOPLE OF THE STATE OF ILLINOIS
ex rel. KACIRIR JAMONTAS and
STANLEY DARGOWIS,

Appellees,

vs.

PETER GALSKIS,

Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE GRINDLEY DELIVERED THE OPINION OF THE COURT.

For the reasons indicated in the opinion this day filed in case No. 31523, in which Paul Miller is appellant, the order of the Circuit Court of Cook County, entered June 22, 1926, finding Peter Galskis guilty of contempt for wilfully failing to appear before a Master in Chancery, Julius H. Miner, and give testimony, fining him \$100, and ordering that he be confined in jail "until such time as he shall offer to comply with the court's order, entered May 26, 1926, directing him to appear before Master in Chancery, Julius H. Miner, and to produce and bring with him the documents, books and memoranda specified and disclosed in the subpoena duces tecum theretofore served upon him," is reversed.

REVERSED.

Barnes, F. J., and Wells, J., concur.

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1916 - 1917

THE COURT OF THE STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE COUNTY OF COOK

STATE OF ILLINOIS
COUNTY OF COOK
IN RE: THE ESTATE OF JAMES H. HARRIS
DECEASED

THE COURT OF THE STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE COUNTY OF COOK
IN RE: THE ESTATE OF JAMES H. HARRIS
DECEASED

THE COURT OF THE STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE COUNTY OF COOK

For the reasons indicated in the opinion this day filed
in case No. 8282, in which said Miller is appellant, the court of
the Circuit Court of Cook County, ordered June 22, 1916, finding
that said Miller guilty of contempt for wilfully failing to appear
before a master in Chancery, Julius H. Miner, and give testimony,
finding him guilty, and ordering that he be confined in jail "until
such time as he shall appear in person with the court's order,"
entered May 26, 1916, directing him to appear before said master in
Chancery, Julius H. Miner, and be produced and bring with him
the necessary books and documents specified and disclosed in the
return made from the sheriff's return upon him," is reversed.

REVEREND

James H. Harris, Jr., and Julius H. Miner, counsel.

PEOPLE OF THE STATE OF ILLINOIS
ex rel. EAZIRIN JAMONTAS and
STARLEY DARGUEIS,

Appellees,

vs.

ANTON ZYMENT,

Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

For the reasons indicated in the opinion this day filed in case No. 31523, in which Paul Miller is appellant, the order of the Circuit Court of Cook County, entered June 22, 1926, finding Anton Zymont guilty of contempt for wilfully failing to appear before a Master in Chancery, Julius H. Miner, and give testimony, fining him \$100, and ordering that he be confined in jail "until such time as he shall offer to comply with the court's order, entered May 26, 1926, directing him to appear before Master in Chancery, Julius H. Miner, and to produce and bring with him the documents, books and memoranda specified and disclosed in the subpoena duces tecum theretofore served upon him," is reversed.

REVERSED.

Barnes, P. J., and Wells, J., concur.

THE STATE OF NEW YORK
IN SENATE
JANUARY 11, 1900.

REPORT

OF THE

COMMISSIONERS OF THE LAND OFFICE

ALBANY: HENRY C. BROWN, 1900.

OF THE

THE LAND OFFICE

For the reasons indicated in the opinion of the

Commissioners, in their report of the 11th day of January, 1900, the

Commissioners of the Land Office, entered into the

order of the Court of Sessions, entered into the

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PAUL GERHART,
Appellee.

v.

HORACE L. BRAND,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in contract, tried before the court without a jury, to recover for certain architect's services, there was a finding and judgment against defendant for \$750, based upon plaintiff's testimony and certain documentary evidence introduced by him. This appeal followed.

The action was commenced on March 14, 1925. Plaintiff alleged in his statement of claim in substance that in April, 1920, defendant employed him to render services as an architect in the alteration and reconstruction of a certain building on premises owned by defendant, and known as 23-25 North Illinois street, Chicago; that he rendered the required services during the months of May and June, 1920, of the value of \$750; and that defendant, although often requested, has refused to pay said sum. Defendant in his affidavit set forth as a defense that, although he was the owner of said premises, he had leased the same to the Illinois Staats Zeitung Publishing Co., a corporation; that plaintiff was employed by it, and not by defendant, to render services as architect; and that defendant is not indebted to plaintiff in any amount.

When the case was called for trial on January 22, 1926, defendant's attorney moved for a continuance because of defendant's unavoidable absence from Chicago. The motion was

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APRIL 1907

CHICAGO, ILL.

STATE OF ILLINOIS
JURY
COUNTY OF COOK
COURT OF COMMON PLEAS

MR. JUSTICE DELANEY DELIVERED THE VERDICT AS FOLLOWS:

In a civil action in contract, filed before the court at Chicago, Ill., to recover for certain defendant's services, there was a finding and judgment against defendant for \$750.00, based upon plaintiff's testimony and certain documentary evidence introduced by him. This appeal followed.

The action was commenced on March 14, 1907. Plaintiff alleged in his statement of claim in substance that in April, 1907, defendant employed him to erect a building on the site of the old building at a certain building on the corner of North and West streets, and known as 25-27 North Illinois street, Chicago; that he rendered the required services during the month of May and June, 1907, of the value of \$750.00; and that defendant, although often requested, has refused to pay said sum. Defendant in his affidavit set forth as a defense that, although he was the owner of said premises, he had leased the same to the Illinois State Printing Co., a corporation; that plaintiff was employed by it, and not by defendant, so that services as exhibited; and that defendant is not indebted to plaintiff in any amount.

When the case was called for trial on January 25, 1908, defendant's attorney moved for a continuance because of defendant's unavailability because from Chicago. The motion was

supported by the affidavit of said attorney in which it is stated in substance that, when the case was first called for trial on January 12, 1926, defendant was away from Chicago because of the illness of his wife, and that, a physician's certificate being presented, the court granted a continuance to January 22nd; that affiant immediately communicated with defendant and subsequently received a letter from him, dated "Duncan, Oklahoma, January 19, 1926" (letter attached); and that if defendant were present he would testify that plaintiff's employment, if any, was made by said Illinois Staats Zeitung Publishing Co., and not by defendant, and that, in the negotiations had between plaintiff and defendant as to plaintiff's employment as architect, defendant was acting as the representative of a committee of stockholders and directors of said Publishing Co. In said attached letter defendant wrote: "Unfortunately both my wife and myself are now sick, way down here. My wife's Chicago physician's attest you have. Tomorrow the local doctor is to make a thorough examination of her. * * Neither of us can now leave for Chicago. I enclose an attest from Dr. Burnett as to my health. I am too sick to return at present. Please have the law suit put off for a month, so I can be sure to be back and defend myself." The enclosed certificate, signed by Dr. Burnett and dated January 19th, is to the effect that defendant is ill and should remain in Duncan for treatment until recovered, which will be eight or ten days.

In view of the issues as framed, disclosing a necessity for the presence of defendant as a witness in court upon the trial in order to properly present his defense, and in view of the facts as disclosed in the affidavit and accompanying papers in support of defendant's motion for a continuance, we are of the opinion that the trial court abused its discretion in not

granting the continuance, and in proceeding to hear the cause upon plaintiff's testimony alone. It sufficiently appeared that both defendant and his wife were ill in a city many miles distant from Chicago and that it was practically impossible for defendant to be present in court on the day set for the trial. (See Allen v. Downing, 2 Scam. 454; Searls v. Munson, 17 Ill. 558, 561; Karr v. Rust, 217 Ill. App. 555, 560.) We think that it is in the interests of justice that the judgment against defendant should be reversed and a new trial had. Furthermore, after an examination of plaintiff's evidence we do not think that it is sufficient to sustain the court's finding and judgment. It does not appear therefrom that he made an express contract with defendant to perform services as architect for the fixed sum of \$750. The theory of his case, as disclosed from his statement of claim, is that he was entitled to recover that amount on a quantum meruit, yet he introduced no evidence tending to show the reasonable value of his services. He testified that for his services he "made a charge of \$750."

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Wells, J., concur.

VALENTINA PISANO,
Appellee,

vs.

ITALO-AMERICAN NATIONAL
UNION,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On September 9, 1924, plaintiff commenced a first class action in assumpsit against a fraternal benefit society, then known as the Sicilian Union of Mutual Benefit, to recover \$1500, being the amount of a death benefit claimed to be due her by reason of the death, intestate, of her husband, Salvatore Pisano, on July 27, 1923, while a member of the society. The name of the society having been changed to that of Italo-American National Union it was agreed during the trial that appropriate amendments to all pleadings and papers be, and the same were, made. It does not appear that any formal certificate or policy was issued to plaintiff's husband, but the undisputed evidence discloses that on July 2, 1923, (twenty-five days before his death) he made written application for membership in the society; that on the same day he submitted to the usual medical examination, answered certain questions asked of him at the time and, after said answers had been transcribed on the usual blank by the examining physician, signed the instrument; that on July 11, 1923, he was admitted as a member of Michele Merlo Lodge, No. 30, one of the society's subordinate lodges; that on July 16, 1923, he paid one month's dues, amounting to 50 cents, and also other customary charges incident to membership - the total payment being \$5.50; and that on July 27, 1923, an operation was performed on him at St. Luke's Hospital in Chicago and that he died during the evening of that day. The

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cause was tried without a jury, resulting in a finding and judgment against defendant for \$1500. This appeal followed.

In the written application, signed by Salvatore Pisano it is stated that in case of his death he desires the mortuary benefit of \$1500 to be paid to his wife. To the question "Have you ever suffered or do you now suffer from any Paralysis, Tuberculosis, Cancer, Syphilis, Pleurisy, Scrofula, Tubercular Fistula?" the answer is "No." To the question "Are you now free from any deformity or infirmity of any nature, and are you in perfect mental and physical condition?" the answer is "Yes." Just above his signature is the following in part:

"I, the undersigned, declare by these presents that I am desirous of joining the ** Society (giving its then name); *** that all the representations made by me in this application are true. I obligate myself that in the event the representations made by me in this application or to the examining physician are false, I will submit myself to suspension or expulsion and reduction of the mortuary benefit as may be decided by the Board of Directors of the Sicilian Union, and to forfeit all that I shall have paid; and that neither I nor my heirs shall be entitled to any refund or benefit of any kind including the mortuary benefit, as the case may be. **"

In the instrument containing various questions to be put to the applicant by the medical examiner and the answers thereto to be transcribed thereon by such examiner, is the question: "Have you ever consulted or been treated by a physician for any ailment or disease? (If so, give dates and full particulars.)" And the answer is "No." Above the signature of the applicant to said instrument is the following: "I warrant on behalf of myself that each of the above answers is full, complete and true, to the best of my knowledge and belief." The medical examiner, Salvatore Vella, was a witness for defendant and he testified that, after the above mentioned question (among others) had been asked of the applicant and after he had answered it and the answer had been transcribed as above, the applicant signed the instrument in his presence.

Vincent Indovina, a physician, called as defendant's witness, testified that on June 1, 1923, (about a month before Pisano applied for membership in the Society) he treated him professionally at his home; that he found him in bed, vomiting and suffering from severe pains in his abdomen; that he expressed the wish to see "another doctor," and that the witness immediately called Dr. S. W. McArthur in consultation, who treated the patient on the following day. Dr. McArthur, defendant's witness and a physician and surgeon on the staff of St. Luke's Hospital, testified in substance that when Pisano was brought to the hospital on July 27, 1923, he was suffering from an acute internal obstruction, a cancer or an "annular carcinoma" which obstructed the bowels; that he operated upon the patient without success; and that the patient would have died without the operation, and was suffering from the same bowel obstruction as when the witness examined and treated him at his home on June 1, 1923.

After a review of the evidence we do not think that plaintiff can recover in this case. It seems clear to us that Pisano made false and fraudulent representations, material to the risk, in his written application for membership in the society, dated July 2, 1923. While it is probable that he did not then know he had been and was suffering from a cancer, he certainly knew that he then had an infirmity of a serious nature and that he was not then in perfect physical condition. It is equally clear that in his statement to the medical examiner, to the effect that he had not consulted or been treated by a physician for any ailment or disease, he made a false and fraudulent representation material to the risk. The uncontradicted evidence discloses that, about one month before he signed said application and made said statements, he was treated by the family physician, Dr. Indovina; that his ailment was then so severe that,

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at his request, another physician, Dr. McArthur, was summoned in consultation, who also treated him; and that said ailment was the cause (doubtless supplemented by the shock of the operation) of his death on July 27, 1923. (See Crosse v. Knights of Honor, 254 Ill. 80, 83; Supreme Council Knights & Ladies of America v. Eggers, 110 Ill. App. 139, 147.)

The judgment of the Municipal court is reversed without remanding the cause.

REVERSED WITH FINDINGS OF FACT.

Barnes, F. J., and Wells, J., concur.

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FINDINGS OF FACT.

We find as ultimate facts in this case that Salvatore Pisano, on July 2, 1933, in his application for membership in the Beneficiary Society, now named the Italo-American National Union, knowingly made a false and fraudulent statement or representation, material to the risk, to the effect that he was then free from any infirmity and was in perfect physical condition, whereas in fact he then was suffering from a serious ailment which within two months thereafter caused his death; and that he at the same time knowingly made a false and fraudulent statement or representation, material to the risk, to the Society's medical examiner, to the effect that he had never consulted or been treated by a physician for any ailment or disease, whereas in fact he had consulted and been treated by two physicians for a serious ailment about one month before.

THE STATE OF NEW YORK

IN SENATE

JANUARY 18, 1902

REPORT OF THE
COMMISSIONERS OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE
JANUARY 18, 1902
ALBANY: J. B. LEECH, STATE PRINTER, 1902.

THE NATIONAL MALLEABLE CASTINGS
COMPANY, a corporation,
Appellee,

v.

IRROUOIS STEEL & IRON COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit for money had and received, commenced August 11, 1922, there was a trial without a jury in June, 1926, resulting in the court finding the issues against defendant and assessing plaintiff's damages at \$2607.17. Defendant appealed from the judgment rendered against it upon the finding. The court allowed plaintiff the full amount of its claim, \$2223.87, and also interest thereon at the legal rate, amounting to \$383.30.

Plaintiff corporation is a large user of malleable iron scrap at one of its plants, known as the Grant Works and located at Cicero, Illinois. Defendant corporation buys and sells scrap metal, operating a yard in Chicago with sidetrack connection with the Baltimore & Ohio Transfer Railroad Co. at Chicago. Plaintiff is accustomed to purchase scrap for its use through various brokers, individuals or corporations, who buy it from defendant and other dealers in Chicago and vicinity.

In its statement of claim plaintiff alleged in substance that, during the years 1920 and 1921, it placed orders for certain scrap metal with certain brokers, and the latter purchased the metal of defendant with instructions that defendant deliver it direct to

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THE NATIONAL INDUSTRIAL CORPORATION
INCORPORATED, A CORPORATION
OF ILLINOIS

THE NATIONAL INDUSTRIAL CORPORATION
INCORPORATED, A CORPORATION
OF ILLINOIS

v.

THE NATIONAL INDUSTRIAL CORPORATION
INCORPORATED, A CORPORATION
OF ILLINOIS

NO. 12012, COUNTY OF COOK, STATE OF ILLINOIS

In an action to recover for money paid and received,
the following facts are shown:

That on or about the 1st day of January, 1935, the

defendant, THE NATIONAL INDUSTRIAL CORPORATION, a corporation

organized under the laws of the State of Illinois, and

having its principal office at Chicago, Illinois, did

send to the plaintiff, THE NATIONAL INDUSTRIAL CORPORATION, a

check for the sum of \$100.00, which check was cashed by

the plaintiff.

The plaintiff is a large firm of well-known

businessmen, known as the Great Western and

located at Chicago, Illinois. Defendant corporation pays and sells

every metal, operating a yard in Chicago with extensive connections

with the defendant and with the plaintiff.

Plaintiff is a business firm of well-known

businessmen, located at Chicago, Illinois, and

defendant and other parties in Chicago and vicinity.

In the statement of claim plaintiff alleged in substance

that, during the years 1935 and 1936, it placed orders for certain

every metal with certain brokers, and the latter purchased the metal

of defendant with instructions that defendant deliver it direct to

plaintiff's said plant at Cicero; that, pursuant to the instructions, defendant loaded four cars (described in column B of an exhibit attached) with scrap metal, - two during the year 1920 and two during June, 1921, - and delivered them to said railroad company, with instructions that it deliver them to plaintiff's plant, and the same were there delivered; that defendant billed the cars to plaintiff, - the bills showing that each car contained certain weights of metal, as set forth in column C of the exhibit; that said weights as billed were incorrect, excessive and false, and that the correct weights, known to defendant, are as shown in column E of the exhibit; that defendant "made fraudulent arrangements" with certain of plaintiff's employees, as a result of which said employees reported to plaintiff that the cars contained said excessive weights, while in fact they contained only the weights as shown in column C; that plaintiff, not knowing of the fraud, paid the brokers for the metal, and in turn they paid defendant therefor, upon the basis of said excessive weights; that the amounts paid exceeded the true amounts due to defendant by the sum of \$2223.87; and that because of the fraud, known to defendant, plaintiff made and defendant received over-payments for the metal amounting in the aggregate to said sum, which is now due and owing to plaintiff. In the exhibit the various weights in each car and the several over-payments for the metal are set forth.

Shortly before the trial, defendant, by its president, Walter S. Gordon, filed an amended affidavit of merits alleging that the four cars "were never shipped by defendant to plaintiff," but "were sold to certain individual dealers and third persons, who (as affiant is informed) resold the cars to divers different persons and corporations, who in turn resold the same until they

plaintiff's said glass is shown; that, pursuant to the in-
structions, defendant handed four sets (consisting in column
2 of an exhibit attached) with each metal, - two during the
year 1931 and two during June, 1932, - and delivered them to said
railroad company, with instructions that it deliver them to plain-
tiff's agent, and the same were there delivered; that defendant
advised the same to plaintiff, - the bills showing that each set
contained certain weights of metal, as set forth in column 3 of
the exhibit; that said weights as billed were incorrect, excessive
and false, and that the correct weights, known to defendant, are
as shown in column 4 of the exhibit; that defendant "made fraudulent
arrangements" with certain of plaintiff's employees, as a result of
which said employees reported to plaintiff that the sets contained
said excessive weights, while in fact they contained only the weights
as shown in column 5 of the exhibit, not knowing of the fraud,
and the proceeds for the metal, and in turn they paid defendant
therefor, upon the basis of said excessive weights; that the amounts
paid exceeded the true amounts due to defendant by the sum of
\$1235.87; and that because of the fraud, known to defendant, plain-
tiff made and defendant received over-payments for the metal amount-
ing in the aggregate to said sum, which is now due and owing to
plaintiff. In the exhibit the various weights in each set and the
several over-payments for the metal are set forth.

Shortly before the trial, defendant, by its president,
William S. Gordon, filed an amended affidavit of matters alleging
that the four sets "were never shipped by defendant to plaintiff,"
and "were sold to certain individual dealers and third persons, who
(as alleged in defendant's) would be sure to deliver different
pieces and organizations, who in turn would the same with their

were finally received by plaintiff;" and that in defendant's contract for selling the cars to said third persons it was provided that they should pay to defendant therefor "on the basis of consumer's weights." Defendant denied that it had entered into "any corrupt agreement" as charged, or that "the weights as furnished by plaintiff to the persons from whom it purchased said cars are false and incorrect." Defendant further alleged that it "never had any contract relation, either express or implied, with plaintiff;" that it never received the sums of money as charged and never came into possession of any money belonging to plaintiff; that, when it received payment for the cars from the persons to whom it sold them, plaintiff had not paid for the metal therein contained to the persons from whom it had purchased the same; and that plaintiff never paid any money to anyone for the metal in excess of the correct weights.

In the transactions regarding the four cars, none of the brokers, corporations or third persons (whatever they may be called) ever had physical possession of them. The metal in each instance was shipped by defendant directly to plaintiff over the railroad, as evidenced by bills in which defendant was the consignor, and plaintiff the consignee. Defendant prepaid the freight charges on the basis of the weights as were determined by the railroad's scales at Homan avenue, after each car had left defendant's yard but before it had been delivered at plaintiff's plant. The cars were weighed on the railroad's scales by different weighmasters, two of whom testified in court. Their testimony and that of another employee of the railroad company was to the effect that the practice was for the weighmaster to enter the gross weight, the tare weight, etc., of each car on a card and then transfer these weights into a permanent book immediately upon his going into

and finally received by plaintiff." and that in defendant's own
 words for calling the case to said third person it was provided
 that they should pay to defendant whatever "on the basis of
 defendant's weights." Defendant denied that it had entered into
 "any such agreement" as charged, or that "the weights on the
 scales by plaintiff in the payment from whom it purchased said
 case are false and incorrect." Defendant further alleged that it
 "never had any confidential relation, either express or implied, with
 plaintiff," that it never received the sum of money as charged,
 and never came into possession of any money belonging to plain-
 tiff; that when it received payment for the case from the person
 to whom it sold same, plaintiff had not paid for the said case;
 and that as the person from whom it had purchased the same, and
 that plaintiff never paid any money to anyone for the case in
 return of the goods weighed.

It is the defendant's contention that the law does, none of
 the weights, measurements or third persons (whether they may be
 called) ever had physical possession of them. The weight in each
 instance was shipped by defendant directly to plaintiff over the
 railroad, as evidenced by bills in which defendant was the consignor,
 and plaintiff the consignee. Defendant would the right weights
 on the basis of the weights as were determined by the railroad's
 scales at Kansas City, either each one had left defendant's yard
 but before it had been delivered to plaintiff's plant. The goods
 were weighed on the railroad's scales by different weighmasters,
 one of whom testified in court. Their testimony and that of another
 employee of the railroad company was to the effect that the
 practice was for the weighmaster to enter the gross weight, the
 tare weight, etc., at each end on a card and then transfer these
 weights into a permanent book immediately upon his going into

the office of the company, which was a short distance away. This book, showing the weights of the metal, as per original entries made therein, was introduced in evidence and said witnesses were examined and cross-examined. The duplicate freight bills kept by the railroad company, and on the basis of which defendant paid the freight charges, were also introduced in evidence as to the second, third and fourth cars. When each of the cars reached plaintiff's plant the metal again was weighed by plaintiff's employees. This was done in compliance with the written contracts made between plaintiff and the brokers (or third persons), wherein it was provided that plaintiff was to pay for the metal on the basis of plaintiff's weights. The weights of the metal, as weighed by plaintiff's weighmaster, Moore, and on the basis of which plaintiff paid the brokers (or third persons), were shown to be considerably in excess of the railroad's company's weights. As to the first car the excess in pounds was 44,260; 2nd car, 77,940; 3rd car, 48,520; 4th car, 42,900. The total excess in dollars, as based upon the different prices of the metal in the several cars was shown to be \$2,223.87. Moore, plaintiff's witness testified to the effect that, during the period of the delivery of the cars, and prior and subsequent thereto, he was engaged in the fraudulent practice, under the direction of one Allen, another of plaintiff's employees, of falsifying the weights of metal delivered at plaintiff's plant and reporting weights to plaintiff which were in excess of the true weights; that he had so falsified the weights of about seventy (70) cars; and that plaintiff first discovered these fraudulent acts in February, 1922. The witness, however, was unable to identify by car number any car in which the weights had been falsified. Allen was not produced as a witness, it appearing that he was in the State of Indiana confined in a sanitarium. Hiatt, plaintiff's

the office of the company, which was a short distance away. This
piece, showing the weight of the metal, as per original entries
made therein, was introduced in evidence and said witnesses were
examined and cross-examined. The duplicate freight bills were
by the railroad company, and on the back of which statement was
the freight charges, were also introduced in evidence as to the
second, third and fourth cars. When each of the cars reached plain-
tiff's plant the metal again was weighed by plaintiff's employees.
This was done in compliance with the written contracts made between
plaintiff and the brokers (on third persons), wherein it was provided
that plaintiff was to pay for the metal on the basis of plaintiff's
weights. The weights of the metal, as weighed by plaintiff's weigh-
master, there, and on the back of which plaintiff paid the brokers
(or third persons), were shown to be considerably in excess of the
railroad's company's weights. As to the first car the excess in
weight was 42,800; and car, 77,960; and car, 42,320; and car, 42,000.
The total excess in weight, as based upon the different pieces of
the metal in the several cars was shown to be \$2,221.27. Now,
plaintiff's witness testified to the effect that, during the
period of the delivery of the cars, the first and second cars
so, he was engaged in the transaction provided, under the direction
of one Allen, another of plaintiff's employees, of collecting the
weights of metal delivered at plaintiff's plant and reporting
weights to plaintiff which were in excess of the true weights; that
he had so falsified the weights of about seventy (70) cars; and
that plaintiff first discovered these fraudulent acts in February,
1932. The witness, however, was unable to identify by car number
any car in which the weights had been falsified. Allen was not
produced as a witness, it appearing that he was in the State of
Indiana confined in a hospital. Also, plaintiff's

superintendent of purchases, also testified that the scheme of falsifying weights, as practised by Moore and Allen, was discovered in February, 1922. During the trial plaintiff, having subpoenaed Walter S. Gordon and his brother, Clifford Gordon, respectively president and secretary of defendant, to produce its books, records and papers relating to the transactions, called them as witnesses under section 33 of the Municipal Court Act. Their testimony was to the effect that, about the middle of February, 1922, defendant's safe in its office was broken into during the night; that on the following morning they found records and papers strewn all over the floor and some of them badly mutilated; that they then burned all of the papers, etc., in a stove; and that therefore they had no books or records of defendant's business transactions, prior to January 1, 1922, to produce. Clifford Gordon further testified that defendant had received payment in full for all cars of metal which it had shipped to plaintiff. And there was evidence tending to show that defendant had received from the brokers (or third persons) for the metal in the four cars sums of money equal in the aggregate to the sums which plaintiff had paid to the brokers, which payments had been based on the weights that were larger than those made by the weighmasters of the railroad company and to the extent as above stated. Defendant made no attempt to show by any evidence what were the true weights of the metal contained in the cars. Although its witness, Johnson, chief clerk of the railroad company, testified that in February, 1921, he had occasion to "question the reliability" of certain weights in a certain shipment to another party, as shown by the scales of the railroad company at Roman avenue, there was no evidence tending to show any inaccuracy in the weights of the four cars as disclosed in the entries in the book of the railroad company.

Counsel for defendant contends that the court's finding is not sufficiently supported by the evidence or the law. We cannot agree. We think it was for the court (a jury trial having been waived) to determine what were the true weights of the metal - those made by the weighmasters of the railroad company and transcribed in the company's book at the time and as shown in the freight bills delivered to defendant, or those higher weights made and reported by plaintiff's weighmaster and on the basis of which plaintiff made the payments for the metal. And we think it was also for the court to determine, if it believed that the railroad weights were the true ones, whether under all the facts and circumstances in evidence the excess moneys paid out by plaintiff came into defendant's hands, which in justice and equity it ought not to retain. In Wilson v. Turner, 164 Ill. 398, 403, it is said: "An action for money had and received will lie whenever one person has received money which, in justice, belongs to another, and which, in justice and right, should be returned." This principle has been applied in many other cases of varying facts by the Supreme and appellate courts of this State. (See Allen v. Stenger, 74 Ill. 119, 121; First National Bank v. Gatten, 173 id. 625, 627; Highway Commissioners v. City of Bloomington, 253 id. 164, 173; People v. Sumner, 274 id. 637, 641; Rommel Brothers v. Wenka, 186 Ill. App. 369, 372.) In the Highway Commissioners case, supra, it is said (p. 173): "The class of obligations now under consideration, and which are treated in works on contracts as 'contracts implied in law,' or quasi contracts, are recognized and enforced by common law courts by means of a general assumpsit. The liability exists from an implication of law that arises from the facts and circumstances independent of agreement or presumed intention. * * In this class of cases the notion of a contract is purely fictitious. * * In the case of contracts

the parties fix their terms and set the bounds upon their liability. As has been well said, in the case of contracts the agreement defines the duty, while in the latter class of cases 'the duty defines the contract.'" Counsel argues that in the present case it does not appear that there was any contract relation between plaintiff and defendant, and that whatever money defendant received for the metal was not plaintiff's money but that of the intermediate brokers (or third persons). Under the principle announced in the cited cases we do not think there is any merit in the argument. In the Highway Commissioners' case, supra, (p. 174) it is said: "The right to recover does not depend upon any principles of privity of contract between the plaintiff and the defendant and no privity is necessary. * * The action is maintainable in all cases where one person has received money or its equivalent under such circumstances that in equity and good conscience he ought not to retain it and which ex aequo et bono belongs to another." In the Rommel Brothers v. Wenke case, supra, it was held in substance that, where a check is drawn for a certain amount on a bank and delivered, and the check is cashed by the bank for a greater amount owing to an ambiguity, the drawer may consider the bank as justified in paying said greater amount and sue the party who cashed the check and recover from him the overpayment in an action for money had and received. The appellate court says in that case (p.372): "Appellant (Wenke) contends that, if he did receive that sum in excess, he is indebted to the bank alone therefor and not to Rommel Brothers, who have not yet paid the bank the amount of the overdraft. He contends that the question whether or not the bank was negligent in paying \$275 on this check, instead of \$2.75, was material to be tried by the jury, and he makes an ingenious argument, which carried to its logical conclusion might relieve him from refunding the excess to

the parties to the contract and the payment upon their liability. It has been well said, in the case of Smith v. Smith, 100 N. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

anybody. These contentions do not meet with our approval." Counsel further argues that there can be no recovery in the present case because the evidence does not disclose that defendant or its officers or agents were connected with any "corrupt agreement" or "conspiracy" to falsify the weights. We do not think it was essential to a recovery that plaintiff should show such connection on defendant's part. The real question is, whether, because of the higher weights reported to plaintiff and on the basis of which it made the excessive payments, defendant has money in its hands which equitably belongs to plaintiff. In the case of Limited Investment Association v. Glendale Association, 99 Wis. 54, 59, it is said "The purpose of such an action (for money had and received) is not to recover damages, but to make the party disgorge; and the recovery must necessarily be limited by the party's enrichment from the alleged transactions. Evidence of crooked dealing or fraudulent practices is only important in determining the plaintiff's right to secure the fund."

Defendant's counsel complain of various rulings of the court in admitting certain evidence offered by plaintiff. We have considered the several points and do not think that the claimed errors, if any there were, are such as require a reversal of the judgment. Nor do we think that there is any merit in counsel's further contention that there exists such a variance between the allegations of plaintiff's statement of claim and the proof as requires a reversal.

But we think that counsel is correct in his further contention that the court erred in allowing plaintiff interest, to the extent of \$383.30, on its claim of \$2223.87. Section 2 of our Interest Act does not warrant the allowance of interest. We cannot say that defendant has withheld the money "by an

... these considerations as to the fact that the money was not
... that there was no recovery in the present case of
... the evidence does not disclose that defendant on the other
... were connected with any "conspiracy agreement" or "conspiracy"
... the witness. We do not think it was essential to a re-
... that plaintiff should have been permitted to introduce
... The real question is, whether, because of the higher weight
... to plaintiff and on the basis of which it made the excessive
... defendant has money in its hands with apparently belong-
... to plaintiff. In the case of United States v. ...
... 201-100, 201-100, it is said "The purpose of
... such an action (for money had and received) is not to recover
... but to make the party plaintiff and the recovery made
... necessarily be limited by the party's attachment from the alleged
... defendant. Evidence of such a kind as to plaintiff's right to recover
... is only relevant in determining the plaintiff's right to recover
... the law."
... Defendant's counsel complains of various rulings of the
... court in admitting certain evidence offered by plaintiff. We
... have considered the several points and do not think that the
... ruling errors, if any there were, are such as require a reversal
... of the judgment. Nor do we think that there is any merit in
... counsel's further contention that there exists such a variance
... between the allegations of plaintiff's statement of claim and the
... facts as requires a reversal.
... But we think that counsel is correct in his further
... contention that the court erred in allowing plaintiff interest
... on the sum of \$285.30, on the claim of \$285.30. Section 3
... of our law does not warrant the allowance of interest.
... It seems to me that defendant was entitled to the money "by law"

unreasonable or vexatious delay of payment;" and this is not an action in tort for damages but one to recover money had and received. (Highway Commissioners v. City of Bloomington, 253 Ill. 164, 178; Gillespie v. Fulton Oil & Gas Co., 161 Ill. App. 248, 252.)

Accordingly, if plaintiff within 10 days remits from the judgment the sum of \$383.30, the same will be affirmed for \$2223.87; otherwise the judgment will be reversed and the cause remanded. If the remittitur is filed, each of the parties will pay its own costs in this appellate court.

APPROVED ON REMITTITUR OF \$383.30.

Barnes, P. J., and Wells, J., concur.

POLISH ROMAN CATHOLIC UNION OF
AMERICA, a corporation,
Appellant,

v.

HELEN J. NOVOTNY et al.,
Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit court, entered in a foreclosure proceeding on July 13, 1926, wherein complainant's original and supplemental bills were dismissed for want of equity.

The original bill against Helen J. Novotny, Thomas J. Novotny, her husband, and others, was filed on October 13, 1923. The mortgage in question, dated September 13, 1921, and duly recorded, was executed by the Novotnys to secure the sum of \$4500, loaned to them by complainant, as evidenced by their three notes payable to complainant's order - two for \$800 each and due respectively in one and two years, and one for \$5,500 due in five years, all drawing interest at 5-1/2 per cent per annum, as shown by certain coupon notes. Default having been made in the payment of the first two notes and accrued interest on the sum loaned, complainant elected, as it had a right to do under the terms of the mortgage, to declare the entire sum due, and filed its bill. After the Novotnys had answered, and the cause was at issue as to such other defendants as had not been defaulted, including certain intervening petitioners and mechanics' lien holders and claimants, the court referred the cause to a master to take proofs and report his conclusions. While the cause was there pending,

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CIVIL COURT

NEW YORK

IN SENATE

APPEALS

IN SENATE

This is an appeal from a decree of the Circuit Court.

entered in a foreclosure proceeding on July 10, 1922, wherein

complainant's original and supplemental bills were dismissed

The original bill against Helen T. Hovey, Thomas

T. Hovey, her husband, and others, was filed on October 10,

1922. The mortgage in question, dated September 18, 1921, and

only recorded, was recorded by the Hoveys in January 1922 and

1922, found to have been by complainant, as evidenced by their later

notes payable to complainant's order - two for \$500 each and one

respectively in one and two parts, and one for \$2,500 due in two

years, all bearing interest at 5-1/2 per cent per annum, as shown

by certain coupon notes. Delays having been made in the payment

of the first two notes and interest accrued on the same.

complainant advised, as it had a right to do under the terms of

the mortgage, to enforce the entire sum due, and filed its bill.

after the Hoveys had answered, and the same was at issue as

to such other statements as had not been admitted, including

certain intervening petitioners and mechanics' lien holders and

claimants. The court entered the decree as a matter to take facts

and report his conclusions. While the case was thus pending,

complainant, on March 10, 1925, by leave of court filed a supplemental bill, to which the Novotnys filed an answer. A mass of oral and documentary evidence was introduced before the master. His report was filed on April 27, 1926. After making many findings, he recommended the entry of a foreclosure decree in substantial accord with the allegations and prayers of the original and supplemental bills. The numerous and overruled objections of the Novotnys to the report were ordered to stand as exceptions. After an incomplete hearing upon the exceptions, the court, on June 9, 1926, and on motion of the Novotnys, ordered that the cause be re-referred to the master for a further hearing, particularly in connection with a certain "Auditor's report, dated May 24, 1926, prepared by the firm of Tylman, Pond & Co., accountants and auditors," which report had first been presented by the Novotnys during the hearing upon their exceptions; and the court further ordered that said hearing be continued to a named day and that "in the meantime the master shall prepare his finding on the law and evidence regarding said auditor's report and prepare a supplemental report on same." The master complied with the order and, on June 22, 1926, filed a supplemental report, in which he commented, generally and specifically, upon the auditor's report. He recommended that his previous report be approved "except that there be a change as to a \$30 credit to defendants' account, this being a clerical error." The Novotnys also filed exceptions to this report and after a further hearing upon all exceptions the court sustained them, found the equities of the cause with the Novotnys, and entered the decree appealed from. A few days thereafter the court, on motion of the master, ordered that the decree be so modified that the master's fees, to the extent of \$1317.62, be taxed as costs against complainant.

complaint, on March 16, 1933, by letter of counsel filed a
supplemental bill, to which the November 1932 bill was amended.
None of the evidence was introduced before the
master. His report was filed on April 27, 1933. After making
many findings, he recommended the entry of a permanent decree
in substantial accord with the allegations and prayers of the
original and supplemental bills. The numerous and overruled
objections of the November 1932 report were ordered to stand
as exceptions. After an incomplete hearing upon the exceptions,
the court, on June 8, 1933, and on motion of the November 1932
bill, the case be referred to the master for a further hearing,
particularly in connection with a certain "Amateur" report, dated
May 24, 1933, prepared by the firm of Tyman, Bond & Co., accountants
and auditors, which report had first been presented by the November
1932 bill. During the hearing upon these exceptions and the court further
ordered that said hearing be continued to a second day and that in
the meantime the master shall prepare his findings on the law and
evidence regarding said auditor's report and prepare a supplemental
report on same. The master complied with the order and, on June
22, 1933, filed a supplemental report, in which he commented,
generally and specifically, upon the auditor's report. He
recommended that his previous report be approved "except that there
be a change as to a \$20 credit to defendant's account, this being
a clerical error." The November 1932 bill also recommended to this
report and after a further hearing upon all exceptions the court
sustained them, found the parties of the case with the November
bill entered the decree appealed from. A few days thereafter the
court, on motion of the master, ordered that the decree be so
modified that the master's fees, to the extent of \$111.25, be
added as costs against complainant.

Among the facts, as found by the master and sustained by the evidence, are the following: The premises in question, now improved with a brick house and occupied by the Novotnys, are located in the Village of Desplaines, Illinois. During the year 1921 they applied to complainant for a building loan and in September, 1921, secured it to the extent of \$6500, and executed and delivered the three notes, the coupon notes, and the mortgage securing them. They received at the time complainant's check for \$6500, which they endorsed, and by agreement the money was turned back to complainant's treasurer, one Pionka, to be disbursed by him or complainant from time to time to material men and contractors as the work on the house progressed. Novotny testified that it was agreed at the time that no money should be paid out by Pionka or complainant to any party furnishing material or labor until either he or his wife and said party appeared before Pionka and the correctness of the party's account was vouched for and he properly identified. When the loan was applied for the Novotnys did not have title to the premises but only a contract for their purchase. The title was in the Chicago Title & Trust Co., as trustee. McIntosh & Co. was or represented the cestui que trust. By agreement Pionka or complainant, out of said \$6500, paid McIntosh & Co. \$2744.26 and a deed to the premises was taken in the name of Mrs. Novotny before the recording of the mortgage in question. Subsequently Pionka or complainant, out of the proceeds of the loan, and with the consent of the Novotnys, paid to the Kines Lumber Co. \$870, and to the Lagerhausen Co., \$1020, for materials and labor. These three payments aggregate \$4634.26. As the work progressed Novotny also paid out of his own funds various amounts, aggregating \$3955.23, to other parties who had furnished material, etc. Disputes arose as to claims of

Charles H. Berg and Sigwalt Lumber & Coal Co. The Novotnys did not vouch for the correctness of these claims and they were not then paid by him, or by complainant out of the balance then remaining on the loan. Berg filed a bill in said circuit court, Case No. B-90948, to enforce his claimed mechanic's lien, against the Novotnys as principal defendants and others. Frank Karlovitch and Joe Hoffbrauer filed intervening petitions claiming liens in small amounts. That suit was referred to a master. The Novotnys, although served with process, did not appear and did not contest the claims. Finally on February 23, 1923, on the master's recommendation, the court entered a decree ordering a sale of the premises to satisfy them. On March 23, 1923, after the first \$500 note was long past due and unpaid, and to prevent a sale of the premises under said decree (it having been adjudged therein that said claims were prior liens to the mortgage in question) complainant necessarily paid, in full satisfaction of said decree and the claims, costs, etc., out of said fund the total sum of \$928.24. The Sigwalt Co. also filed a bill in the Superior court of Cook county, Case No. 366,960, to enforce its claimed mechanic's lien, against the Novotnys as principal defendants and others. The Novotnys were duly served with process and filed an answer. Various other parties claiming liens in small amounts filed intervening petitions. That suit also was referred to a master, and resulted in the entry of a decree sustaining the lien claims and directing a sale of the premises, etc. Subsequently, on January 29, 1925, to secure the master's certificate of satisfaction of the decree, complainant necessarily paid the sum of \$1159.84. The Novotnys also had failed to pay the general taxes on the premises for the year 1922, amounting to \$87, and also a

Charles E. Harty and Elizabeth Harty & Son, Inc. The Harty family
has been for the purpose of these claims and they were not
made plain by him, or by explanation out of the claims. The
claim on the issue. Harty filed a bill in said circuit court.
Good E. H. Harty, to enforce his claimed mechanic's lien, against the
Harty family as principal defendants and others. From said
and the Harty family filed intervening petitions claiming liens in
said matters. That bill was returned to a master. The Harty
although served with process, did not appear and did not contest
the claims. Finally on February 22, 1920, on the master's
recommendation, the court entered a decree ordering a sale of the
premises to satisfy them. On March 22, 1920, after the time
1920 was not long past the said decree, and in answer to a bill of
the Harty family which stated (it having been at length therein
that said claims were given them in the master's report)
complaints were made. In full satisfaction of said decree
and the claims, costs, etc., and of said bill the court on
March 22, 1920, the Harty Co. also filed a bill in the Superior Court
of Cook County, Case No. 222,222, to enforce its claimed mechanic's
lien, against the Harty family as principal defendants and others.
The Harty family also moved with process and time on master.
Further after parties claimed liens in said matters filed
intervening petitions. That bill was returned to a master, and
resulted in the entry of a decree sustaining the lien claim and
directing a sale of the premises, etc. Subsequently, on January
22, 1922, to secure the master's certificate of satisfaction of
the decree, complaint was made the sum of \$1250.00.
The Harty family also had failed to pay the general taxes on the
premises for the year 1922, amounting to \$97, and also a

certain past due special assessment thereon, amounting to \$41.74, and said taxes and assessment, on July 10, 1923, were paid by complainant. It will be noticed that the aggregate of the above mentioned payments, so made by complainant, are in excess of the amount of the loan (\$6500) by several hundred dollars.

In his original report in the present cause, the master further found that during the hearing the Novotnys claimed that the entire proceeds of the loan had not been paid out by complainant to material men, etc., as agreed, and that there remained \$2210.74, which belonged to them; that there was no merit in the claim; and that under the terms of the mortgage and the facts disclosed complainant was justified in paying the amounts of the Berg and Sigwalt Co.'s decrees, plus costs and expenses, and deducting the amounts disbursed from the balance remaining of the \$6500, and charging the Novotnys with the excess, as being an additional amount due over and above that due under the mortgage, together with accrued interest thereon. After reviewing the evidence we think that the master reached a proper conclusion in this regard, as he also did in allowing to complainant, and charging the Novotnys with, said disbursements for the taxes and the special assessments above mentioned. But the master in his account charged the Novotnys not only with the principal sum of said three notes (\$6500) and accrued interest thereon, but also (erroneously in our opinion) with all of complainant's disbursements made in connection with satisfying the Berg and Sigwalt decrees, and in paying said taxes and special assessment. This was in effect a double charge against them to the extent of the amount of the loan remaining in the hands of complainant, after said disbursements first above mentioned, aggregating \$4634.26, had been made, and probably some other small though proper disbursements. Of course,

On this part the special assessment is \$11.75.

and all taxes and assessments, on July 10, 1932, were paid by complainant. It will be noticed that the aggregate of the above mentioned payments, so made by complainant, and in excess of the amount of the loan (\$4300) by several hundred dollars.

In his original report in the present case, the master further found that during the hearing the Novotny advised that the entire proceeds of the loan had not been paid out by complainant for material men, etc., as stated, and that there remained \$11.75 which belonged to them; that there was no merit in the claim and that under the terms of the mortgage and the facts disclosed complainant was justified in paying the amount of the debt and

against Co.'s interest, plus costs and expenses, and deducting the amount disbursed from the balance remaining of the \$4300, and

advising the Novotny with the money, as being an additional amount for over and above that due under the mortgage, together with accrued interest thereon. After reviewing the evidence we think that the master reached a proper conclusion in this regard, as he also did in relation to complainant, and changing the Novotny with, said

disbursements for the taxes and the special assessment above mentioned. But the master in his account charged the Novotny not only with the principal sum of this loan (\$4300) but also interest thereon, and also (erroneously in our opinion) with all of complainant's disbursements made in connection with foreclosing the debt and giving a proper discharge, and in paying said taxes and special assessment. This was in effect a double charge

against them to the extent of the amount of the loan remaining in the hands of complainant, after said disbursements had above mentioned, including \$11.75, was paid made, and probably some other small though proper disbursements. Of course,

any moneys properly disbursed by complainant, after the proceeds of said loan had entirely been exhausted, were proper charges against the Novotnys, plus interest at the proper rate from date of disbursement. The master in his account also erroneously charged the Novotnys with too much interest. The master recommended that complainant be allowed as and for its reasonable solicitor's fees the sum of \$1700; and also that \$746.60 be allowed for stenographer's fees for the taking of the mass of testimony that was taken. We do not at this time pass upon the reasonableness of said fees, or upon the reasonableness of the master's fees of \$1817.62, as afterwards allowed by the court.

Another contention of the Novotnys made before the master, as we understand it, is, that complainant was not entitled to a foreclosure at the time it filed its bill, first, because the claimed balance of the original loan of \$2210.74 had not been disbursed, and, second, because after the maturity of the two \$500 notes and before the bill was filed he had forwarded to complainant certain of his checks which complainant refused to receive. Some of the master's findings, sustained by the evidence, are that when the first \$500 note matured on September 15, 1922, the Novotnys failed to pay it or the accrued interest thereon or any of the accrued interest on the other two notes; that complainant several times notified them of their default; that they pleaded for time, etc.; that on December 12, 1922, the directors of complainant passed a resolution electing that the entire loan become immediately due and payable, and directing the institution of foreclosure proceedings; that during that month, and early in January, 1923, complainant, by its attorney, sent registered letters to the Novotnys advising them of the action and that foreclosure proceedings would be commenced if all money in arrears was not

[illegible]

shortly paid; that they continued to plead for further time, etc.; that just before the second \$500 note matured on September 15, 1923, Thomas J. Novotny mailed his check for \$500 to complainant; that on September 18, 1923, he mailed another check for \$200 and on October 2, 1923, still another check for \$250; that each and all of these checks (not aggregating the face of the two notes) were returned in complainant's letters to him, in which he was advised that it would not accept any amounts less than the total amount due, including interest, costs, etc.; that when these letters were delivered by the postal authorities to him he refused to receive them and the same were returned to complainant, in whose possession they were at the time of the hearing; and that said checks were never accepted or cashed by complainant. The master concluded that complainant was justified in refusing to accept the checks and that there was no merit in the Novotny's contentions. We agree with these conclusions. We think it clearly appears from the preponderance of the evidence that, after the first \$500 note matured and was unpaid and the Novotnys were pressed to pay it and all interest due, neither of them then made any such contention as above mentioned, viz, that there was any undisbursed balance of the loan in complainant's hands which should have been disbursed to those material men and laborers, whose accounts or claims Thomas J. Novotny himself had paid. On the contrary, it appears that all they did at the time was to make repeated promises to pay and requests for additional time until they could procure a new loan. And the evidence further shows, as found by the master, that complainant was "very lenient" with them as to said requests, and that the present bill to foreclose was not filed until after the second \$500 note had matured. According to the testimony of Thomas J. Novotny it would appear that, after

...that they ...
...the second \$500 note ...
...Thomas J. ...
...1912, he ...
...1912, still ...
...of these ...
...returned in ...
...that it would ...
...two, ...
...delivered by ...
...then and the ...
...they were at ...
...never accepted ...
...that ...
...and that there ...
...with these ...
......
......
...all interest ...
...above ...
...the law in ...
...these material ...
...Nevsky himself ...
...they did at ...
......
...and the evidence ...
......
...and that the ...
...after the second \$500 note ...
......
......
......

the maturity of said first \$500 note, he responded to complainant's demand for its payment, together with all accrued interest, with a counter demand for an accounting as to said claimed undisbursed sum of \$2210.74, and that one of complainant's officers told him to pay the note and there would be an adjustment afterwards as to his claim. According to the clear weight of the evidence, however, Novotny made no such counter demand, but only pleaded for further time. It would also appear that Novotny on the hearing was trying, so to speak, to "amend his hold," if any he had, which should not be allowed. (Gibson v. Brown, 214 Ill. 330, 341; Miller v. Gordon, 296 Ill. 346, 352.) On the hearing Novotny also claimed that the amounts awarded to Berg and to the Sigwalt Co. by the decrees entered in their favor, which decrees were afterwards satisfied by complainant, were too large. Those decrees cannot thus collaterally be attacked, but can only be reviewed in a direct proceeding. (Grove v. Kerr, 318 Ill. 591, 595.)

After a somewhat careful review of the present record we are unable to understand upon what theory the court dismissed complainant's original and supplemental bills for want of equity, and are of the opinion that the court erred in entering such decree. Clearly, complainant was entitled to recover from the Novotnys a large sum of money due on said loan as evidenced by said notes, and also was entitled to a foreclosure decree of the premises in this proceeding. Accordingly, the decree appealed from, dismissing said bills, is reversed and the cause is remanded, with directions that the court refer it to the master with directions that he re-state the accounts between all the parties to the litigation, determine priorities of the respective liens, etc., and, upon that being done and the accounts reported, etc., that the court take such further proceedings and enter such new decree as to equity and good conscience shall appertain, and not inconsistent with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

Barnes, P. J., and Wells, J., concur.

the majority of said first \$200 note, he requested to complainant's demand for the payment, together with all accrued interest, with a counter demand for an accounting as to said claimed undistributed sum of \$2810.74, and that one of complainant's witnesses told him to pay the note and there would be an adjustment afterwards as to his claim. According to the direct report of the witness, however, Hovey made no such counter demand, but only stated for the first time. It would also appear that Hovey on the hearing was trying to get to the point, in "what his hold," it was in fact, which should not be allowed. (Hovey v. Hovey, 214 Ill. 320, 321; Hovey v. Hovey, 214 Ill. 320, 321.) On the hearing Hovey also claimed that the account awarded to him and to the Illinois Co. by the hearing entered in their favor, which account was of course admitted by complainant, was the issue. These issues cannot thus satisfactorily be disposed, but can only be reviewed in a direct proceeding.

(Hovey v. Hovey, 214 Ill. 320, 321.)

After a somewhat careful review of the present record we are unable to understand upon what theory the court dismissed complainant's original and supplemental bills for want of equity, and as of the opinion that the court acted in entering such decree. Clearly, complainant was entitled to recover from the Hoveys a large sum of money due on said loan as evidenced by said notes, and also was entitled to a foreclosure decree of the premises in this proceeding. Accordingly, the decree appealed from dismissing said

bills, is reversed and the cause is remanded, with directions that the court restore it to the matter with directions that he re-state the substance between all the parties to the litigation, determine the parties of the respective claims, etc., and, upon that being done and the accounts reported, etc., that the court make such further proceedings and enter such decree as to equity and good conscience as it appears, and not inconsistent with the above herein expressed

REVEREND AND HONORABLE WITH DIRECTIONS.

James, P. J., and Wells, J., concur.

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HERBERT W. DUNCANSON, HARRIET
B. DUNCANSON and MERSCHEL M.
BYALL,

Appellants,

v.

GEORGE LILL and WILLIAM W. LILL,
Appellees.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal it is sought to reverse a decree of the Superior court, entered March 31, 1925, wherein the court, following the recommendation of the master, dismissed complainants' amended bill for want of equity. The appeal was taken to the Supreme Court, but in its opinion, filed October 28, 1926, it was held that a freshhold was not involved and the cause was transferred to this appellate court (Duncanson v. Lill, 322 Ill. 528, 534.) Subsequent to its docketing here the death of George Lill, on October 26, 1926, was suggested, and it was ordered that the Northern Trust Company, executor of his will, be substituted as one of the appellees in his stead.

In complainants' amended bill, filed October 18, 1920, it is alleged that on March 29, 1913, Duncanson and his wife, Harriet B. Duncanson (née Davis), were the beneficial owners of the premises in question, known as the Veto Building, located on the southwest corner of Broadway and Ainslee street, Chicago, and consisting of apartments and offices; that the title was in the Chicago Title & Trust Co., as trustee (under a trust agreement dated February 24, 1917, and known as Trust No. 6906) and that the premises were encumbered by two trust deeds; that defendants were officers and in control of a corporation engaged

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LEGAL COUNSEL
UNIT, COOK COUNTY

ROBERT V. THOMAS, JR.
J. THOMAS and ROBERT V.
THOMAS, JR.

Appellants

v.

COOK COUNTY and WILLIAM V. LEE,
Appellees

THE COURT GRANTED WRIT OF HABEAS CORPUS.

By this appeal it is sought to reverse a decree of the
superior court, entered March 31, 1930, wherein the court, follow-
ing the recommendation of the master, dismissed complainant's
petition for writ of habeas corpus. The appeal was taken to the
supreme court, but in its opinion, filed October 22, 1930, it was
held that a franchise was not involved and the cause was remanded
to the superior court (Thompson v. Lee, 331 Ill. 538, 544).
In this appeal to the supreme court the death of George Lee, an
employee of the defendant, who died of George Lee, on
October 20, 1929, was suggested, and it was ordered that the
Northern Trust Company, executor of his will, be appointed as
one of the appellees in his stead.

In complainant's amended bill, filed October 12, 1930,
it is alleged that on March 22, 1915, complainant and his wife,
Bertha V. Thompson (née Davis), were the beneficial owners of
the premises in question, known as the Yoko Building, located on
the southeast corner of Broadway and LaSalle Street, Chicago.
At the time of the purchase and title was in
the name of Yoko & Trust Co., as trustees under a trust
agreement dated February 24, 1917, and known as Trust No. 5903)
and that the premises were conveyed by said trust to the
appellees were appellees and in control of a corporation engaged

in the coal business, and that Duncanson was indebted to it in a considerable sum for coal used in the building and other buildings controlled by him; that defendants were threatening not to furnish further coal if the indebtedness was not paid; that an arrangement was made whereby the Duncansons conveyed their interest in the premises to defendants "as security" for the indebtedness and other advances (which together with the incumbrances amounted to about \$55,000) and with the understanding that the Duncansons "should have the right to redeem or repurchase the premises * * at any time within a period of two years," by assuming the incumbrances and the repayment of all moneys expended by defendants in connection with the premises, over and above the amount received by them from the rents and profits derived from the building during that period, together with 6% interest upon any balance, and that during the period Duncanson "should have the right to sell" the premises for a sum not less than \$55,000, and "be entitled to one-half of any profit" that might accrue by reason of the sale, after repaying to defendants all of the money expended by them in the operation and maintenance of the building, payment of incumbrances, etc., over and above the amount received by them from the rents and profits of the building; that on March 29, 1918, in accordance with the arrangement the Duncansons assigned and transferred their said interest to defendants and empowered the Chicago Title & Trust Co., as trustee, to convey the premises to them or to such person as they might direct; that on the same day, to "partially" evidence the arrangement, Duncanson and defendants entered into a written agreement (copy attached and marked Exhibit A); that, while the agreement specifies that Duncanson should have the right at any time within two years to sell the premises at a price not less than \$55,000, the real understanding was that the Duncansons "should have the right

in the coal business, and that insurance was included in it. A considerable sum was paid in the building and other buildings controlled by him; that the buildings were financed not in connection with the coal business but in connection with the insurance business. It was further stated that the insurance was not paid; that an arrangement was made whereby the insurance company paid their interest in the premises to defendants "as security" for the insurance and other advances (which together with the insurance amounted to about \$10,000) and with the understanding that the insurance "should have the right to return or repurchase the premises" at any time within a period of two years, "by assuming the insurance and the payment of all money expended by defendants in connection with the premises, over and above the amount received by them from the rents and profits derived from the building during that period; together with 5% interest upon any balance, and that during the period defendants "should have the right to sell" the premises for a sum not less than \$10,000, and "be entitled to one-half of any profit" not might receive by reason of the sale, after repaying to defendants all of the money expended by them in the operation and maintenance of the building, payment of insurances, etc.; even and above the amount received by them from the rents and profits of the building; that on March 27, 1915, an agreement with the arrangement the insurance assigned and transferred their cash interest in return and assigned the building to them for, as interest, to convey the premises to them or to such person as they might direct; that on the same day, to "partially" evidence the arrangement, insurance and defendants entered into a written agreement (copy attached and marked Exhibit A); that, while the agreement specified that insurance should have the right at any time within two years to sell the premises at a price not less than \$10,000, the real understanding was that the insurance "should have the right

at any time within the two years to re-acquire the equity," upon repayment to defendants of all money they had invested in the same, including the amount of said coal indebtedness and also the cost of operating and maintaining the building, etc., less amounts received by them from the rents and profits; that in effect the transfer was "as security, or as a mortgage, rather than an absolute conveyance," and "with the right of redemption" in the Duncansons at any time within the two years; that on March 9, 1920, Duncanson entered into a contract with Byall (also a complainant) for the sale of the premises to Byall for \$55,000, and that notice in writing of the making of this contract, together with a copy of the contract, were given to defendants, their attorney, and the Chicago Title & Trust Co. on March 10, 1920 (copy of notice attached and marked Exhibit B); that defendants have refused to transfer the premises to Byall, and, although often requested, have failed and refused to render a full and true account showing in detail all moneys expended by them in the payment of incumbrances, interest on same, insurance premiums, taxes, etc., and all other expenses incurred in the maintenance and operation of said building and premises, and also showing all income, rents and profits received by them. The bill prayed for an accounting and a receiver, and for a transfer of defendants' interest in the premises to Byall or Duncanson, or to such person as Duncanson might elect, upon the Duncansons paying to defendants all moneys due them as would appear from the accounting, the Duncansons being ready and willing to make payment in accordance therewith.

In the agreement of March 29, 1918, made a part of the bill as Exhibit A, it is provided that defendants, as "owners of the equity" in the premises, authorize and empower Duncanson "to sell said equity," and that, if he "sells"

the same within two years, they agree to pay him "as and for his compensation for the making of such sale, * * a sum equal to one-half of the net proceeds of such sale," after deducting from the sale price all sums paid by defendants in the purchase of the property, all moneys expended in the payment of incumbrances, interest, insurance premiums, taxes, special assessments and imposts of every kind and nature, maintaining and operating expenses, and all other liabilities, costs and charges, together with interest thereon at 6% per annum, less the income derived from the property; and the right of Duncanson to share in the proceeds "is conditional upon his being the procuring cause thereof." It is further provided that Duncanson is to share in the proceeds in the event that the sale price plus the incumbrances thereon, "shall exceed \$55,000, and then only in the sum for which it sells in excess of \$55,000, after making the deductions and computations hereinabove provided for." It is further provided that, if defendants shall receive an "offer for said equity" acceptable to them, Duncanson is to be notified by mail, and, if within 14 days he does not find a purchaser at a sum equal to that offered and upon the same terms, then defendants "shall have the right to accept the offer and Duncanson shall not have any right to share in the proceeds."

In the written notice, dated March 9, 1920, and attached to the bill as Exhibit B, Duncanson notifies defendants that he has "this day effected a sale" to Byall for \$55,000 and such additional sum, if any, as may be necessary to pay any sum due to defendants, and that in the contract for sale with Byall it is provided that the same must be consummated within 90 days, and that Byall will assume the incumbrances and pay the balance in cash at the time of the delivery of the deed. It is also stated that the provision for consummation within 90 days "will

the same rights as before. The terms of the contract are as follows: The contract is for the sale of the property, together with the right of the seller to the proceeds of such sale, after deducting from the sale price all sums paid by defendant in the payment of the property. All money received in the payment of the property, interest, expenses, taxes, special assessments and charges of every kind and nature, including the cost of advertising, and all other liabilities, costs and charges, together with interest thereon at the rate of six per annum, shall be received from the property and the right of defendant to share in the proceeds is conditional upon the balance the proceeds being "as shown". It is further provided that defendant is to share in the proceeds in the event that the sale price gives the instrument shown, "which amount \$25,000, and then only in the sum for which it sells in excess of \$25,000, after deducting the deductions and commissions hereinafter provided for. It is further provided that, if defendant shall receive an offer for said equity, acceptable to them, defendant is to be notified by mail, and, if within 10 days he does not find a purchaser at a sum equal to that offered and upon the same terms, then defendant shall have the right to accept the offer and defendant shall not have any right to share in the proceeds." In the witness whereof, dated March 2, 1920, and attested to the bill as Exhibit B. Common-law notice defendant that he has "this day effected a sale" to Hylly for \$25,000 and much additional sum. It may be necessary to pay any sum due to defendant, and that in the contract for sale with Hylly it is provided that the same must be communicated within 10 days and that Hylly will receive the instrument and pay the balance in cash at the time of the delivery of the deed. It is also stated that the provision for communication within 10 days will

give us plenty of time to adjust all matters of accounting," and that he (Duncanson) will be glad to meet defendants at their early convenience to "check over the income and expenses of the building received and incurred since March 29, 1918, for the purpose of determining the amount to which George and William Lill are entitled, as provided for in the contract."

On January 20, 1921, by leave of court, complainants filed an amendment to their amended bill in which they alleged that defendants have kept books of account of all transactions in connection with the premises since March 29, 1918, and have a record of all rents derived and all moneys expended by them in operating the building, etc., and they prayed that defendants answer specifically four interrogatories, viz, (1) the amount of income derived by defendants from the building since March 29, 1918; (2) all sums expended by defendants since that date in operating and maintaining the building; (3) the amount due to the coal corporation from Duncanson on said date on his coal indebtedness; or (4), in lieu of the foregoing, "file detailed statement of account from your books covering the information asked for in the three questions."

On April 20, 1921, defendants filed their answer to the amended bill as amended, but they refused to answer the four interrogatories, taking the position, as stated therein, that they should not be required to do so until it had first been determined that an accounting was due from them, and further that the discovery sought in no manner tended to prove or disprove that complainants had any interest in the premises. The chancellor was of the opinion that the interrogatories should be answered, and on April 30, 1921, entered a rule upon defendants to do so, but they did not comply, and subsequently they were adjudged to be in contempt and fined. From this contempt order they appealed to this appellate court,

and as a result of this it is not possible to determine the exact amount of the (amount) which will be paid to the defendant as a result of the only contract to "which" the defendant and witness of the building received and received since March 22, 1931, for the purpose of determining the amount to which George and William Hill are entitled, as provided for in the contract."

On January 20, 1931, by leave of court, complainant filed an amendment to their amended bill in which they stated that defendants have kept books of account of all transactions in connection with the premises since March 22, 1931, and have a record of all rents received and all money expended in the operation of the building, etc., and they prayed that defendants answer specifically their interrogatories, viz, (1) the amount of income derived by defendants from the building since March 22, 1931; (2) all sums expended by defendants since that date in operating and maintaining the building; (3) the amount due to the real corporation from defendant on said date on his real indebtedness; or (4), in lieu of the foregoing, "the detailed statement of account from your books covering the information asked for in the three questions."

On April 20, 1931, defendants filed their answer to the amended bill as amended, but they refused to answer the four interrogatories, taking the position as stated therein, that they should not be required to do so until it had first been determined that an accounting was due from them, and further that the discovery sought in no manner tended to prove or disprove their complaints and any interest in the premises. The objection was of the opinion that the interrogatories should be answered, and on April 20, 1931, entered a rule upon defendants to do so, but they did not comply, and subsequently they were ordered to do so in contempt and fined. From this contempt order they appealed to this appellate court.

where on May 23, 1922, the order was affirmed. (People, etc. ex rel. Duncanson v. Lill, 225 Ill. App. 664.)

On October 5, 1922, defendants filed an amendment to their answer in which they set forth full detailed statements of account, showing (a) the total debits as against Duncanson in the purchase by defendants of the premises on March 29, 1918, of \$55,342.52, and credits in his favor of \$55,287.52, leaving a balance in favor of defendants of \$55; in said debit items are included the two incumbrances, aggregating \$45,000, and accrued interest thereon, taxes, the coal indebtedness and interest thereon, an incidental item, and a check to Duncanson of \$6,112.01; in the credit items to Duncanson the "purchase price" of \$55,000 is mentioned and the \$287.52 is made up of rebates on insurance premiums and water tax; (b) the rents collected by defendants, from April 30, 1918, to August 31, 1922, of \$45,468.75; (c) the total expenses of maintenance and operation during the same period, of \$12,161.50; (d) other moneys disbursed by defendants from March 30, 1918, to and including July, 1922, for taxes, coal, interest, special assessments, insurance and other items, totaling \$20,713.20; (e) recapitulation, showing total receipts of \$45,468.75, and total disbursements of \$32,874.70, and leaving a balance in defendants' hands of \$12,594.05.

To this answer as amended complainants filed a replication, and on November 15, 1922, the cause was referred to a master to take proofs and report his recommendations on certain issues, as shown by the pleadings and as specifically mentioned in the order of reference.

Considerable evidence, oral and documentary, was introduced before the master. His report was filed on April 3, 1924. Among his findings are, in substance, that on March 29,

above on May 22, 1932, the order was affirmed. (Exhibit 10)

On October 8, 1932, defendant filed an amended petition

in which they set forth full detailed statement of account, showing (a) the total debts on account incurred in the

business of defendant of the previous on March 22, 1932, at

\$12,242.57, and credits in the favor of \$22,227.00, leaving a

balance in favor of defendant of \$10,000 in cash and other items and

including the two inventories, aggregating \$45,000, and account

interest thereon, taxes, the real improvements and interest thereon,

an incidental item, and a sum of \$1,111.11 in the

credit item to defendant the "purchase price" of \$25,000 in non-

liquidated and the \$22,227.00 is made up of various on insurance premiums

and water rent; (b) the rents collected by defendant, from April 22,

1932, to August 21, 1932, of \$42,442.75; (c) the total expenses of

maintenance and operation during the same period, of \$11,111.11;

(d) other money advanced by defendant from March 20, 1932, to

and including July 1, 1932, for taxes, interest, general expenses,

and other items, totaling \$22,227.00; (e) the

collection, showing total receipts of \$42,442.75, and total dis-

bursements of \$22,227.00, and leaving a balance in defendant's

hands of \$20,215.75.

In this account as amended defendant filed a petition,

and on November 10, 1932, the same was referred to a master to

take proofs and report his recommendations on certain issues,

as shown by the pleadings and as specifically mentioned in

the order of reference.

Conclusive evidence, oral and documentary, was

introduced before the master. His report was filed on April 2,

1933. Among his findings was, in substance, that on March 20,

1918, defendants were officers of, and in control of, the coal corporation mentioned in the bill, and that Duncanson then was indebted to it for \$2951.61, for coal furnished the Veto Building and other buildings owned or controlled by him, and that the coal corporation then was pressing him for immediate payment of the indebtedness; that there is no merit in Duncanson's contention that at that time, by reason of certain regulations of the United States Fuel Administration, he was bound to purchase coal for the buildings from the coal corporation, because the evidence shows that no such restriction then was in force; that, after demands made upon Duncanson for payment and after negotiations, it was agreed that, in consideration of defendants' satisfying said indebtedness, the Duncansons would sell and transfer to them their interest in the premises, and they did so by written assignment, dated March 29, 1918, introduced in evidence; that in that instrument, signed by them, it is stated that they, in consideration of one dollar and other valuable considerations "do hereby sell, assign, transfer and set over" to defendants "all our right, title and interest" in and to the premises (describing them), "as shown by a certain declaration of trust, known as Trust Number 6906, made by the Chicago Title & Trust Co.; and we do hereby * * authorize, direct and empower" it "to convey said property * * to" defendants (naming them), or either of them, or to such other person as they may direct; that also, under date of March 29, 1918, Duncanson and defendants executed and delivered the agreement as is attached to complainants' bill as Exhibit A; that then there was a first mortgage on the premises of \$30,000 and a second mortgage of \$15,000 (a part of the latter being due) and accrued interest due on both mortgages; that there then were taxes due of \$911.33, etc.; that the total claims then against the property, assumed

THIS, defendant was advised of, and in compliance of, the same
 corporate certificate was filed in the office of the Secretary of State
 on or about the 15th day of May, 1911, for the purpose of having the same
 and other buildings owned or controlled by him, and that the same
 corporation then was passing him the amount of \$100,000.
 In addition, that there is no doubt in defendant's mind that
 that at that time, by reason of certain regulations of the United
 States War Administration, he was bound to purchase coal for the
 buildings from the coal corporation, because the evidence shows
 that no such transaction then was in force; that, after demand
 made upon defendant for payment of the coal bill, it was
 agreed that, in consideration of defendant's supplying coal in-
 debtedness, the defendant would sell and transfer to him their
 interest in the business, and that this was the result of the
 dated March 22, 1911, entered in evidence; and in that trans-
 action, signed by him, it is stated that, in consideration of
 one dollar and other valuable consideration "he hereby sells,
 assigns, transfers and conveys" to defendant "all my right, title
 and interest" in and to the premises (described therein), "as shown
 by a certain declaration of trust, known as Trust Number 4000,
 made by the Chicago Title & Trust Co. and to have effect as to the
 trust and property" is "so conveyed said property" to the defendant
 (naming them), or either of them, or to such other person as they
 may direct; that also, under date of March 22, 1911, defendant and
 defendant executed and delivered the agreement as is attached to
 complaint, with an exhibit A; that then there was a first
 mortgage on the premises of \$20,000 and a second mortgage of
 \$12,000 (a part of the latter being due) and a renewed interest due
 on both mortgages; that there then were taxes due of \$211.25,
 etc.; that the total claims then against the property, amounted

by defendants, amounted to \$46,278.90; that Duncanson then owed the coal corporation the sum of \$2951.61, which was paid by defendants on that date, and that Duncanson also then was paid by defendants \$6,112.01; that the matured \$5,000 note on said second mortgage was paid by defendants' attorney; that on March 9, 1920, Duncanson entered into the contract with Byall for the sale of the premises for \$85,000; that they then were worth over \$70,000, while in March, 1918, their value was much less; that Byall is a clerk in the office of one of the solicitors for the Duncansons and entered into said contract at said solicitor's request and solely for the joint benefit of said solicitor and Duncanson; that Byall is not the real party to the contract but, in making it, was acting solely for them; that, at the time the premises were transferred to the Lills on March 29, 1918, Duncanson received all that they reasonably were worth; that the attempted sale by Duncanson to Byall, in March, 1920, was for a sum much less than the then real value of the property, and was an attempt to deprive defendants of their share in the profits (to which they were entitled) of a bona fide sale under the terms of said agreement of March 29, 1918, which such sale might have been made within the time limited; and that said attempted sale was not in accordance with said agreement and is void.

In discussing the main contention made by complainants on the hearing before the master he states that the contention was that, while said agreement of March 29, 1918, provides that Duncanson should have the right at any time within two years to sell the premises at a price not less than \$85,000, the real understanding between the parties was that the Duncansons should have the right within said period to "re-acquire the equity" in the premises upon repayment to defendants of all moneys invested by them therein, including said coal bill and the cost of operating

by defendant, amounted to \$44,878.75; that defendant then used
the coal corporation the sum of \$500.00, which was paid by
defendant on that date, and that defendant also paid \$100.00
defendant \$112.00; that the returned \$5,000 note on said account
mortgage was paid by defendant's attorney; that on March 9, 1915,
defendant entered into the contract with Spill for the sale of the
premises for \$25,000; that that time there were debts over \$25,000, this
in March, 1915, their value was much less; that Spill is a clerk
in the office of one of the collectors for the defendant and
entered into said contract as said collector's servant and solely
for the joint benefit of said collector and defendant; that Spill
is not the real party to the contract but, in making it, was acting
solely for them; that, at the time the premises were transferred
to the title on March 24, 1915, defendant received all that they
reasonably were worth; that the attempted sale by defendant to Spill,
in March, 1915, was for a sum much less than the then real value of
the property, and was an attempt to deprive defendant of their
share in the profits (so which they were entitled) of a sale made
sole under the terms of said agreement of March 23, 1915, which was
sole might have been made within the time limited and that said
attempted sale was not in accordance with said agreement and is void.
In discussing the main contention made by complainant
on the hearing before the master he stated that the contention
was that, while said agreement of March 23, 1915, provided that
defendant should have the right at any time within two years to
sell the premises at a price not less than \$25,000, the real value
standing between the parties was that the defendant should have
the right to claim said parties to "re-negotiate the equity" in the
premises upon repayment to defendant of all moneys invested by
them therein, including said cash bill and the cost of operating

and maintaining the premises and payments on incumbrances and interest, less all amounts received by defendants from the rents and profits of the premises, and that in effect the said assignment and transfer of March 29, 1918, of the Duncansons' beneficial interest in the premises to defendants was "as security, or as a mortgage rather than an absolute conveyance, with the right of redemption" in the Duncansons. The master, however, found that said agreement of March 29, 1918, "constitutes the agreement between the parties, and that no verbal agreement (as contended by the Duncansons) was ever made between the parties, and the master, therefore, concludes that the transaction between Duncanson and defendants was an absolute conveyance and transfer of the premises and not a mortgage." The master finally concluded that complainants have "failed to prove any of the material allegations" of their bill, and recommended that the bill be dismissed for want of equity. After a hearing on complainants' exceptions to the report, the court confirmed the report and entered the decree appealed from, as first above mentioned.

After considering the issues as framed by the pleadings, and after a review of the evidence contained in the present transcript, we are of the opinion that the decree, following the master's findings and conclusions, should be affirmed. It is the well established rule that a master's findings, approved by the chancellor, will not be disturbed unless manifestly against the weight of the evidence. (Union Colliery Co. v. Fishback, 299 Ill. 165, 170.) In the present case we think those findings and the decree are amply supported by the evidence. It appears that in the transaction of March 29, 1918, the Duncansons sold and transferred their beneficial interest in the premises absolutely to defendants for the considerations disclosed, and

by defendants, amounted to \$44,787.90; that defendant then over
the said corporation the sum of \$44,787.90, which was paid by
defendants on 12-1-1915, and that defendant then paid the sum of
\$44,787.90 to the said corporation on 12-1-1915, and that defendant
mortgage a title of defendant's attorney; that on March 9, 1916,
defendant entered into the contract with Spill for the sale of the
premises for \$25,000; that they then were worth over \$25,000, while
in March, 1916, their value was much less; that Spill is a clerk
in the office of one of the collectors for the defendant and
entered into said contract as said collector's servant and solely
for the joint benefit of said collector and defendant; that Spill
is not the real party to the contract but, in making it, was acting
solely for them; that, at the time the premises were transferred
to the title on March 20, 1916, defendant received all that they
reasonably were worth; that the attempted sale by defendant to Spill,
in March, 1916, was for a sum much less than the then real value of
the property, and was an attempt to deprive defendant of their
share in the profits (to which they were entitled) of a large sum
paid under the terms of said agreement of March 20, 1916, which such
sale might have been made within the time limited and that said
attempted sale was not in accordance with said agreement and is void.
In discussing the main contention made by complainant
on the hearing before the master he stated that the contention
was that, while said agreement of March 20, 1916, provided that
defendant should have the right at any time within two years to
sell the premises at a price not less than \$25,000, the real value
standing between the parties was that the defendant should have
the right within said period to "re-acquire the equity" in the
premises upon repayment to defendant of all money invested by
them therein, including said cost and the cost of operating

and maintaining the premises and payments on incumbrances and interest, less all amounts received by defendants from the rents and profits of the premises, and that in effect the said assignment and transfer of March 29, 1913, of the Duncansons' beneficial interest in the premises to defendants was "as security, or as a mortgage rather than an absolute conveyance, with the right of redemption" in the Duncansons. The master, however, found that said agreement of March 29, 1913, "constitutes the agreement between the parties, and that no verbal agreement (as contended by the Duncansons) was ever made between the parties, and the master, therefore, concludes that the transaction between Duncanson and defendants was an absolute conveyance and transfer of the premises and not a mortgage." The master finally concluded that complainants have "failed to prove any of the material allegations" of their bill, and recommended that the bill be dismissed for want of equity. After a hearing on complainants' exceptions to the report, the court confirmed the report and entered the decree appealed from, as first above mentioned.

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and maintaining the premises and contents of the same as well as interest, and all amounts received by the defendant from the same and profits of the premises, and that in effect the said assignment and transfer of March 22, 1915, of the defendant's beneficial interest in the premises to defendant was "an assignment, or as a mortgage, rather than an absolute conveyance, with the right of redemption" in the premises. The master, however, found that said assignment of March 22, 1915, "constitutes the agreement between the parties, and that no verbal agreement (as contended by the defendant) was ever made between the parties, and the master, therefore, concludes that the transaction between defendant and defendant was an absolute conveyance and transfer of the premises and not a mortgage." The master finally concludes that defendant have failed to prove any of the material allegations of their bill, and recommended that the bill be dismissed for want of equity. After a hearing on defendant's exceptions to the report, the court confirmed the report and entered the decree appealed from, as first above mentioned.

After considering the issues as framed by the pleadings, and after a review of the evidence contained in the present transcript, we are of the opinion that the master, following the master's findings and conclusions, should be affirmed. It is the well established rule that a master's findings, approved by the chancellor, will not be disturbed unless manifestly against the weight of the evidence. (Union College vs. V. L. Latham, 220 Ill. 182, 190.) In the present case we think these findings and the decree are fully supported by the evidence. It appears that in the transaction of March 22, 1915, the defendant sold and transferred their beneficial interest in the premises absolutely to defendant for the consideration disclosed, and

that said transfer was not made "as security or as a mortgage," with the right of redemption, as contended by counsel. On that day they signed and delivered an instrument, selling and transferring said interest to defendants. No mention is made therein that the conveyance is only as security for a debt or as a mortgage. And the master properly found that no other verbal agreement was made between the parties. Even if there had been, evidence of it could not be admitted to vary or contradict the terms of the written agreement. (Schultz v. Plankinton Bank, 141 Ill. 116, 120.) On the same day, also, the defendants and Duncanson entered into another written agreement whereby defendants, as "owners of the equity" in the premises, authorized and empowered Duncanson as their agent to "sell" that equity, and they agreed that, if he did so at any time within two years, they would pay him, "as and for his compensation for the making of such sale," a sum equal to one-half of the "net proceeds" of the sale, providing he was the "procuring cause thereof." The agreement fully states what is meant by the term 'net proceeds'; and further provides that Duncanson is only to share in said proceeds in the event that the sale price, plus the incumbrances on the property, "shall exceed \$55,000," and then only in the "excess" above that sum, less deductions mentioned; and further provides that defendants may themselves sell said equity upon 14 days' notice to Duncanson and under certain named conditions. Under this agreement we do not think that Duncanson was given any right to acquire said beneficial interest himself, either directly, or indirectly through Byall, a clerk in the office of his solicitor. The evidence sufficiently disclosed, as found by the master, that Byall was not a bona fide buyer of said interest, and that the proposed sale to him, at a price

that said document was not made "in writing" as a mortgage,
with the right of redemption, as demanded by counsel. On this
day they were and collected an instrument, selling and trans-
ferring said interest to defendants. No mention is made therein
that the mortgage is only as security for a debt or as a
mortgage. And the master properly found that no other valid
agreement was made between the parties. Even if there had been,
evidence of it could not be admitted to vary an instrument in
form of its written agreement. (Harris v. Harris, 100 Cal.
141 111, 112, 113.) On the same day, also, the defendants and
plaintiff entered into another written agreement whereby de-
fendants, as "assigns of the equity" in the premises, authorized and
agreed to assign to their agent to "sell" that equity, and they
agreed that it be sold at any time within two years. They
said to him, "as per his assignment for the value of same
said equity to be sold of the 'and proceeds' of the sale,
proceeding from the 'proceeding' done thereto." The agreement
further stated that in view of the fact that proceeds in the
premises that defendant is not to have in said proceeds in the
event that the sale fails, give the instrument as the property,
which exceeds \$10,000, and the sale in the "event" above that
said, the defendant's mortgage and further provides that de-
fendants may themselves sell said equity upon 10 days' notice to
plaintiff and under certain named conditions. Under this agree-
ment it is not said that defendant was given any right to
execute said beneficial interest himself, which is clearly
an inconsistency through which, a clerk in the office of his
counselor. The evidence sufficiently discloses, as found by
the master, that said will was not a valid legal paper of valid
interest, and that the proposed sale to him was a failed

considerably less than its then reasonable worth, was a mere sham, and an attempt on complainants' part to deprive defendants of their share of the profits to which they would have been entitled upon a bona fide sale. Complainants did not come into a court of equity with clean hands. Furthermore, specific performance of the purported sale to Byall could not properly have been decreed, as counsel urges should have been done. In Tyler v. Sanborn, 138 Ill. 136, 142, it is said: "The doctrine is familiar * * that an agent can not, either directly or indirectly, have an interest in the sale of the property of his principal which is within the scope of his agency, without the consent of his principal, freely given, after full knowledge of every matter known to the agent which might affect the principal. * * The rule is not merely remedial of wrong actually committed, - it is intended to be preventive of wrong. * * The rule is equally applicable to cases where the agent is empowered to sell, as in the present case, at a stated price, as where his authority is to sell generally." Counsel also contend that defendants ratified Luncanson's act in making the contract of sale of said interest to Byall, and are thereby estopped to now question Luncanson's authority so to do. There is no merit in the contention. There is no evidence showing that defendants, with knowledge, ever indicated their intention of accepting the contract which Luncanson claims he made with Byall.

The decree appealed from, dismissing complainants' amended bill for want of equity, should be affirmed and it is so ordered.

AFFIRMED.

Barnes, P. J., and Wells, J., concur.

considerably less than the reasonable value, was a mere sham,
and an attempt on complainant's part to defraud defendant of their
share of the profits of the sale. The fact that the defendant had
been misled is immaterial. The defendant did not even take a look at the
title.

Furthermore, specifically performance of the pur-

ported sale to the defendant has been denied, and

several pages should have been done. In *Tracy v. Tracy*, 10

111. 125, 126, it is said: "The doctrine is familiar - a sale of

land can not, either directly or indirectly, have an interest

in the sale of the property of the principal which is within the

scope of his agency, without the consent of the principal. Truly

given, after full knowledge of every matter known to the agent

which agent affects the principal. * * The rule is not merely

formal of wrong actually committed, - it is intended to be

preventive of wrong. * * The rule is equally applicable to cases

where the agent is empowered to sell, as in the present case, as

a stated price, as where his authority is to sell generally."

It is also contended that defendant's alleged knowledge of the

fact of the contract of sale of said interest to Tracy, and the

fact of the sale to the defendant, is immaterial, as it is

there is no merit in the contention. There is no evidence showing

that defendant, with knowledge, was induced to make the sale

of the property to the defendant. The defendant claims to have

Tracy.

The defense offered Tracy, claiming that the

contract was not a sale of property, and that it is not

relevant.

Tracy v. Tracy, 101, 111, 112, 113.

Tracy v. Tracy, 101, 111, 112, 113.

Tracy v. Tracy, 101, 111, 112, 113.

THE MILLER-JONES COMPANY,
a corporation,
Plaintiff in Error,

v.

L. FELDMAN, trading as
L. FELDMAN & COMPANY,
Defendant in Error.

ERRON TO MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE GRIBLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff commenced in the Municipal court a 4th class action in contract against defendant to recover, as alleged in its statement of claim, a balance of \$42 for merchandise sold and delivered. Defendant filed an affidavit of merits claiming that the merchandise had fully been paid for. On October 4, 1926, the cause regularly came on for trial before the court without a jury, and neither defendant nor his attorney appeared. The court, after hearing plaintiff's evidence, found the issues in its favor and assessed its damages at \$42 and entered judgment on the finding against defendant.

On November 15, 1926, more than 30 days after the entry of the judgment, defendant appeared by attorney and moved the court to vacate it, and that there be a new trial, etc. The motion was supported by defendant's affidavit. On the hearing, plaintiff's attorney expressly waived the presentation by defendant of a "petition," as mentioned in section 21 of the Municipal Court Act, which would contain the same allegations as in the affidavit, and it was agreed that the affidavit might be considered as a petition. At the conclusion of the hearing the court ordered that defendant's motion be granted and the judgment vacated.

Plaintiff seeks by this writ of error, issued December 1, 1926,

THE UNITED STATES OF AMERICA
VS
JOHN EDGAR HOOVER

THE UNITED STATES OF AMERICA
VS
JOHN EDGAR HOOVER

THE UNITED STATES OF AMERICA
VS
JOHN EDGAR HOOVER

THE UNITED STATES OF AMERICA
VS
JOHN EDGAR HOOVER

Plaintiff commenced in the municipal court a civil case
action in contract against defendant to recover, on alleged in
the statement of claim, a balance of \$10 for merchandise sold
and delivered. Defendant filed an affidavit of denial claiming
that the merchandise had only been paid for. On October 4,
1935, the cause regularly came on for trial before the court
without a jury, and neither defendant nor his attorney appeared.
The court, after hearing plaintiff's evidence, found the balance
in its favor and entered its judgment of \$10 and entered judgment
on the finding against defendant.

On November 15, 1935, more than 30 days after the entry
of the judgment, defendant appeared by attorney and moved the court
to vacate it, and that there be a new trial, etc. The motion was
granted by defendant's attorney. On the hearing, plaintiff's
attorney expressly waived the presentation by defendant of a
"petition" as mentioned in section 12 of the Municipal Court Act.
This would amount to the same situation as in the affidavit, and
it was agreed that the affidavit might be admitted as a petition.
The conclusion of the hearing the court ordered that
defendant's motion be granted and the judgment vacated.
Plaintiff seeks by this writ of error, issued December 1, 1935,

to set aside the order. The present transcript further discloses that, after the bill of exceptions, as to said proceedings on November 15, 1926, had been signed by the trial judge and filed, the cause came on for trial and, plaintiff not appearing, it was ordered dismissed for want of prosecution and a judgment was entered against plaintiff for costs on November 23, 1926. Plaintiff also seeks by this writ of error to reverse said last mentioned judgment.

As to the court's order of November 15, 1926, (vacating said judgment of October 4, 1926, for \$42 against defendant) we are of the opinion that the court did not have jurisdiction to enter it, inasmuch as defendant's motion to vacate said judgment was not made or entered until more than 30 days had elapsed since its entry. (See Ill. Municipal Court Act; People v. Wells, 255 Ill. 450, 453; Gage Hotel Co. v. Kanteas, 185 Ill. App. 393, 395; Price v. Marie, 207 Ill. App. 112, 116.) Defendant's affidavit, contained in the bill of exceptions, does not set forth facts which would be sufficient to vacate the judgment by a bill in equity, nor are any errors in fact in the proceedings set forth which might have been corrected at common law by the writ of error coram nobis, or similar motion. It clearly appears from the affidavit that defendant's failure to^{be} present at the trial of the cause on October 4, 1926, and not to be represented thereat, was due to the negligence of his attorney. (See Inbrie v. Bear, 230 Ill. App. 155, 157.) And the court was not warranted in entering said judgment of November 23, 1926.

Accordingly, that judgment, and the court's order of November 15, 1926, vacating said former judgment of October 4, 1926, are reversed. This leaves said judgment of October 4, 1926, standing in full force and effect.

REVERSED.

Barnes, P. J., and Wells, J., concur.

SAM KALAS,
Appellee,

v.

DEMETRA FANCY BAKERY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE GRIBLEY DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted to reverse a judgment for \$445.51, entered in the Municipal court against defendant on September 14, 1926, in an action of the 4th class in contract, tried before the court without a jury.

In his statement of claim plaintiff alleges that his claim is for a balance of salary due to him as "general manager" of defendant corporation in its bakery business in Chicago; that during the period from September, 1923, to October 14, 1924, he was employed in that capacity at a salary of \$100 per month, and that he faithfully performed his duties and received payments from defendant from time to time on account; and that there is now due to him from defendant a balance of \$445.51, which it has refused to pay.

In defendant's affidavit of merits, by its president, Christ Kariotis, the defense is stated to be that during said period plaintiff was an "officer" (secretary) of defendant and a member of its board of directors; that as such officer he served the corporation at an agreed salary of \$50 per month, which has been paid to him in full in addition to board and lodging; and that defendant is not indebted to him in any sum.

On the trial plaintiff was the only witness. His

testimony was to the effect that shortly prior to September 1, 1923, he purchased some of the stock of defendant corporation, became its secretary, and was hired by Christ Kariotis and Louis Paulakes, respectively its president and treasurer, to act as its general manager at a salary of \$100 per month; that it then was agreed that his duties as general manager were "to stay in the shop, do all the purchasing, take care of the operations of the bakery, and also keep the books;" that he continuously acted as manager and performed his duties until October 14, 1924, when he resigned and severed all connection with the company; that he never received any salary as secretary; that during said period he was credited on defendant's books each month with his salary of \$100 as manager, except the month of October, 1924, when he was credited with \$50, covering the one-half of the month that he worked; that from time to time, as against this salary account he drew out money and the same was charged to him; and that the true balance due to him on October 14, 1924, was \$445.51, no part of which has been paid. Prior to the trial plaintiff served notice on defendant to produce certain of defendant's books of account and certain of its checks and particularly the original ledger page of plaintiff's account with defendant, otherwise secondary evidence thereof would be offered. Defendant failed to produce the books, etc., and gave no excuse for not doing so. Thereupon plaintiff offered, and the court admitted in evidence, a photographic copy of said original ledger page, which plaintiff testified was a true and correct copy. This disclosed that on October 14, 1924, there was a balance due to plaintiff for salary of \$445.51. No evidence whatever was introduced by defendant.

We think that plaintiff's claim for balance of salary as general manager of defendants is amply sustained

testimony was to the effect that shortly prior to September 1, 1933, he purchased some of the stock of defendant corporation, through the intermediary, and was hired by United Lumber and Lumber Sales, respectively the president and treasurer, to act as its general manager at a salary of \$100 per month; that it was also agreed that his duties as general manager were "to stay in the shop, do all the purchasing, take care of the operations of the company, and also keep the books"; that he continuously acted as manager and performed his duties until October 14, 1934, when he resigned and received all consideration with the company; that he never received any salary or remuneration; that during said period he was credited on defendant's books each month with his salary of \$100 as manager, except the month of October, 1934, when he was credited with \$25, covering the one-half of the month then he worked; that from time to time, as agreed, the salary account he drew out money and the same was assigned to him; and that the time between his resignation and October 14, 1934, was \$400.00, no part of which has been paid. Prior to the trial plaintiff received notice on defendant's books certain of defendant's books of account and certain of the books and particularly the original ledger page of plaintiff's account with defendant, otherwise necessary evidence thereof would be offered. Defendant failed to produce the books, etc., and gave no excuse for not doing so. Thereupon plaintiff offered, and the court admitted in evidence, a photostatic copy of said original ledger page, which plaintiff furnished was a true and correct copy. This disclosed that on October 14, 1934, there was a balance due to plaintiff for salary of \$400.00. No evidence whatever was introduced by defendant.

To claim that plaintiff's claim for balance of salary as general manager of defendant is empty and without

by his testimony and the copy of said ledger page of defendant's ledger. There was no evidence to the contrary. And we do not think that there is any merit in defendant's contention to the effect that, if a salary of \$100 per month was agreed to be paid to him, the agreement was illegal because he was an officer (secretary) of the company at the time the agreement was made. The evidence clearly shows that, about the time he became an officer and a member of the board of directors of defendant, he was employed by its president and treasurer, at a salary of \$100 per month, to act in another capacity, viz, as general manager with certain prescribed duties, and that during the period of his employment he faithfully performed those duties and drew out of the company's funds from time to time moneys on account of his salary, all with the acquiescence of said officers and the company. His contract of employment made with said officers was ratified continually by the company. Equally without merit is counsel's further contention that the copy of said ledger page of defendant's books should not have been allowed in evidence, because it did not contain original entries. It was admissible as being in the nature of an admission against interest, and as defendant's declaration in writing of the amount of its said indebtedness to plaintiff.

(Loewenthal v. McCormick, 101 Ill. 143, 150.)

The judgment appealed from should be affirmed, and it is so ordered.

AFFIRMED.

Barnes, P. J., and Wells, J., concur.

by his testimony and the copy of said ledger page at defendant's
lodging. That was no evidence in the case. It is not
likely that there is any more in defendant's possession of the
said book. It is a matter of fact that defendant was agreed to be paid
to him, the agreement was illegal because he was an officer
(secretary) of the company at the time the agreement was made.
The evidence clearly shows that, about the time he became an
officer and a member of the board of directors of defendant, he
was employed by the president and treasurer, at a salary of \$100
per month, to act in another capacity, viz., as general manager
with certain prescribed duties, and that during the period of his
employment he faithfully performed those duties and gave out of
the company's funds from time to time money on account of his
salary, all the expenditures of said officer and the company.
The contract of employment made with said officer was entirely
testamentary by the company. Finally, it should be noted that
the fact that defendant had the copy of said ledger page at defendant's
lodging should not have been allowed in evidence, because it did not
contain original entries. It was inadmissible as being in the nature
of an admission against interest, and as defendant's decision in
viewing of the amount of the said indebtedness to plaintiff.

Defendant v. Plaintiff, 101 Ill. 143, 180.

The judgment appealed from should be affirmed, and

it is so ordered.

ATTEST:

Witness, J. B. and W. H. J., county.

RADIO RECEPTOR COMPANY, INC.,
a corporation,

Appellee,

v.

STANDARD RADIO CORPORATION,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE ORIDLEY DELIVERED THE OPINION OF THE COURT.

In an action of the first class in assumpsit, commenced May 30, 1925, there was a verdict finding the issues in plaintiff's favor and assessing its damages at \$899.26. After judgment entered against defendant in said sum, this appeal was taken.

In the statement of claim it is alleged that at various times during the months of November and December, 1924, plaintiff, a New York corporation, sold and delivered to defendant at Chicago certain goods, consisting of radio supplies and accessories (itemized in the statement), of the total amount at invoice prices of \$2569.80; and that in January, 1925, defendant made two payments, aggregating \$1197.46, for portions of the goods, leaving a balance due to plaintiff of \$1372.34, which defendant has refused to pay.

In its affidavit of merits defendant, by Rubin Kromer, president, stated the defense to be in substance as follows:

(1) That the goods were purchased under an oral agreement, made in November, 1924, that any goods thereafter purchased and received might be returned by defendant if not satisfactory to it and credit given accordingly, and that in pursuance of the agreement defendant, on January 23, 1925, returned to

ESD. A. I. C. S.

1990

WILLIAM L. BROWN
JAMES A. BROWN
JOHN L. BROWN

1. THE UNITED STATES OF AMERICA
2. DEPARTMENT OF JUSTICE
3. OFFICE OF THE ATTORNEY GENERAL
4. DIVISION OF INVESTIGATION
5. WASHINGTON, D. C. 20535
6. MAY 19, 1964
7. MEMPHIS, TENNESSEE
8. TO: DIRECTOR, FBI
9. FROM: SAC, MEMPHIS
10. SUBJECT: MARTIN LUTHER KING, JR.
11. RE: MEMPHIS TELETYPE TO BUREAU
12. MAY 18, 1964
13. PENDING

1. The first group of people who are affected by this disease are the young people who are born with it. They are called "congenitally affected" people. They are born with a defect in their body that makes them unable to produce enough of a certain substance called "phenylalanine". This substance is important for the body to function properly. If it is not produced in enough quantities, it can lead to a condition called "phenylketonuria" (PKU). This condition can cause mental retardation and other serious health problems if it is not treated properly. The treatment for PKU is a special diet that is low in phenylalanine. This diet is usually prescribed by a doctor and is followed for the rest of the person's life.

• Impression of audio quality not to reflect on it

...and will deliver a new credit, 2001, on full acceptance

● 1990年1月1日起，凡在境内销售货物或提供应税劳务的单位和个人，均须依法缴纳增值税。

0.1.13, was taken as a starting point for the design of the present work.

...continued from page 124...

to such people as it will be necessary and if

Unusual has occurred to inform and assist each other

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religions other than Christianity, which likewise applied to the

~~XXXXXXXXXXXX~~

1964, 1965, and 1966. The 1964-1965 season was the best for the season.

SECRET

the study to identify of each animal a general, strong, to

* Top of poster and associated photo

* number 100 * numbered edition to distribute all

originals, and the originals are not to be sent out.

John + Mary + Jane are not working now they are sick (3)

See Broadway photograph above page 1001, removed in

as protection for the children of Detroit as they have been

and to encourage all staff to be vigilant about any signs of

of hunter, 2001, 22 years old, no, indicated income

plaintiff certain of the goods, of the value at invoice prices of \$1089.79, because they were not satisfactory (leaving a balance due on such goods as had been retained of \$282.85); and (2) that on April 30, 1924, several months prior to the making of said oral agreement plaintiff and defendant entered into a written agreement, signed by plaintiff, by its agent H. C. Blume, and by defendant, by R. E. Wolf, its vice president, wherein plaintiff authorized certain advertising by defendant, at plaintiff's expense, of certain radio goods in newspapers in twelve insertions at a cost of \$22 per insertion; that during November, 1924, defendant placed and paid for two advertisements in Chicago newspapers, costing \$300, which sum plaintiff has not paid to defendant; and that defendant is entitled to a credit therefor on its account with plaintiff, leaving nothing due to it.

At the commencement of the trial in December, 1926, it appeared from statements made by the attorneys for the respective parties that plaintiff, as regards those goods which defendant had returned by carrier to plaintiff in January, 1925, (of invoice prices of \$1089.79, and which plaintiff had at first refused to accept from the carrier), had finally received them and had sold them for defendant's account for the sum of \$210, and plaintiff's attorney further stated that plaintiff's said claim of \$1372.34 should thereby be reduced (or to \$1162.34). Thereupon a dispute arose as to the order of introducing evidence and the court ruled that, because of the issues as framed by the pleadings and the defense being an affirmative one, defendant should first introduce its evidence. Thereupon Rubin Kromer, president of defendant, testified in its behalf to the effect that during the fall of 1924 he and Robert E. Davis, manager of defendant's sales' department, had a conversation with H. C. Blume, plaintiff's

plaintiff certain of the goods, of the value of thirteen hundred
of \$1000.00, because they were not satisfactory (leaving a balance
on such goods as had been retained of \$200.00) and (2) that
on April 30, 1934, several months prior to the making of said oral
agreement plaintiff and defendant entered into a written agreement,
signed by plaintiff, by its agent R. C. Evans, and by defendant,
by R. E. Wolf, the vice president, wherein plaintiff authorized
certain advertising by defendant, at plaintiff's expense, of certain
radio goods in newspapers in making investments of a total of \$25 per
insertion (that during November, 1934, defendant placed and paid for
two advertisements in Chicago newspapers, costing \$200, which were
plaintiff had not paid to defendant and that defendant in violation
of a verbal agreement on its account with plaintiff, leaving nothing
due to it.

At the termination of the trial in December, 1934, it
appeared from the evidence that the attorney for the respective
parties had failed, as regards those goods which defendant had
retained by carrier to plaintiff in January, 1935, to receive
value of \$1000.00, and which plaintiff had at first refused to
accept from the carrier, had finally received them and had paid
for defendant's attorney for the sum of \$210, and plaintiff's
attorney further stated that plaintiff's said claim of \$1000.00
should thereby be reduced (or to \$1142.34). Thereupon a dispute
arose as to the order of introducing evidence and the court ruled
that, because of the issues as framed by the pleadings and the
evidence being an affirmative one, defendant should first introduce
its evidence. Thereupon R. E. Evans, president of defendant,
testified in the behalf of the effect then during the trial of
that he and Robert E. Davis, manager of defendant's sales
department, had a conversation with R. C. Evans, plaintiff's

Chicago sales agent, regarding the goods in question; that it was verbally agreed that plaintiff might ship them to defendant at said invoice prices and that such of them as were found unsatisfactory to it or to its trade might be returned to plaintiff and credit given accordingly; and that after the goods had been received and defendant had found some of them to be unsatisfactory, Kremer, in Davis' presence, informed Jacques Kohner, president of plaintiff and who then was in Chicago on a business trip, that some of the goods were not satisfactory and would be returned. Davis, defendant's witness, corroborated Kremer's testimony as to said conversations and as to the verbal agreement defendant had made with Blume as to the return of such goods as were not satisfactory. Defendant also introduced evidence showing that certain of the goods in question, amounting at invoice prices to \$1089.79, were returned by carrier to plaintiff during January, 1925, as being unsatisfactory to defendant, and also introduced certain letters passing between the parties relative to the returned goods. While the above testimony was being heard by the jury, the attorneys for the respective parties stipulated that, if defendant could prove that it made an agreement with plaintiff whereby it might return the goods in question in the event it found them to be unsatisfactory for any reason, then defendant would not be required to show that said goods were in fact defective. As to contracts made between the parties concerning advertisements of certain radio goods, which advertisements were to be procured by defendant but the expense thereof was to be paid for by plaintiff, it appears that during the year, 1924, defendant had been purchasing from time to time radio goods from plaintiff for re-sale. Davis testified that two contracts regarding advertisements were entered into between the parties, - one a written one on April 30, 1924, and that subsequently, at the time the goods in question

Chicago sales agent, regarding the goods in question; that it was
 verbally agreed that plaintiff might ship them to defendant at
 defendant's expense and that such of them as were found unsatisfactory
 would be returned to plaintiff and that after the goods had been re-
 ceived and defendant had found them to be unsatisfactory.
 Plaintiff, in Davis' presence, informed defendant, president of
 plaintiff and also then was in Chicago on a business trip, that
 some of the goods were not satisfactory and would be returned.
 Davis, defendant's witness, corroborated Kerner's testimony as to
 this conversation and as to the verbal agreement defendant had
 made with him as to the return of such goods as were not satis-
 factory. Defendant also introduced evidence showing that certain
 of the goods in question, amounting at invoice prices to \$104.75,
 were returned by plaintiff to defendant during January, 1932, as
 being unsatisfactory to defendant, and also introduced certain
 evidence bearing upon the parties relative to the returned goods.
 While the above testimony was being given by the jury, the
 attorneys for the respective parties stipulated that, if defendant
 could prove that it made an agreement with plaintiff whereby
 it might return the goods in question in the event it found them
 to be unsatisfactory for any reason, then defendant would not be
 required to show that said goods were in fact defective. As to
 contracts made between the parties concerning advertisement of
 certain radio goods, which advertisements were to be prepared by
 defendant but the expense thereof was to be paid for by plaintiff,
 it appears that during the year, 1931, defendant had been purchasing
 from time to time radio goods from plaintiff for re-sale. Davis
 testified that two contracts regarding advertisements were
 entered into between the parties, - one a written one on April
 30, 1931, and that subsequently, at the time the goods in question

were ordered, said written contract was modified by an oral one as to the number of insertions and as to the amount plaintiff was to pay. The written contract was introduced in evidence, but Davis was not allowed to testify as to what the subsequent oral contract was, which he, acting for defendant, had made with Blume at the time the goods in question were ordered of plaintiff through Blume, nor was defendant allowed to show by other oral and documentary evidence offered, that, acting under said contract as modified, defendant placed and paid for two advertisements in Chicago newspapers, each costing \$150 or a total of \$300, for which expenditure defendant was entitled to a credit on its account with plaintiff.

No evidence was introduced by plaintiff except certain testimony, supplemented by certain writings, taken by ex parte depositions in New York City subsequent to the filing of defendant's affidavit of merits and considerably prior to the trial in court. In Kehner's deposition, read to the jury, he testified that he, on plaintiff's behalf, never made any such agreements with defendant as stated in its affidavit of merits, and that he never agreed with defendant that goods purchased by it might be returned if not satisfactory. In the deposition of Hugo Cohn, read to the jury, he testified that on February 20, 1925, after the goods in question had been sent back by carrier to plaintiff, he, in plaintiff's name, wrote defendant that "we are today instructing the railroad warehouse to deliver to us the 15 cartons of radio material which they are holding; we are taking this material in only for the purpose of avoiding unnecessary damages, and are not accepting them as returned goods, but merely holding them subject to your order." (A copy of this letter was attached to his deposition.) He further testified that subsequently plaintiff

were stated, with witness testimony was modified by an affidavit
as to the number of witnesses and as to the amount of liability
was to pay. The witness testimony was introduced in evidence.
The affidavit was not allowed to testify as to what the amount
of the contract was, which he, acting for defendant, had made with
him at the time the goods in question were ordered by plaintiff.
Through him, that was defendant allowed to show by other oral
and documentary evidence offered, that, acting under said contract
he modified, defendant placed and gave for the defendant's use
Chicago newspaper, each costing \$100 as a total of \$200, for which
expensive defendant was entitled to a credit on his account
with plaintiff.
The witness was introduced by plaintiff through certain
testimony, supplemented by certain writings, taken by the
deposition in New York City subsequent to the filing of defendant's
affidavit of merits and considerably prior to the trial in court.
In Roman's deposition, read to the jury, he testified that he
on plaintiff's behalf, never made any such agreement with defendant
as stated in the affidavit of merits, and that he never agreed with
defendant that goods purchased by it might be returned if not
satisfactory. In the deposition of Hugo Kahn, read to the jury,
he testified that on February 20, 1928, after the goods in question
had been sent back by carrier to plaintiff, he, in plaintiff's
name, wrote defendant that "we are today investigating the return
of the goods to deliver to us the 10 percent of value material which
they are holding; we are taking this material in only for the
purpose of avoiding unnecessary damages, and are not accepting
them as returned goods, but merely holding them subject to
your order." (A copy of this letter was attached to his
deposition.) He further testified that subsequently plaintiff

sold portions of the returned goods, but not all of them for the reason that plaintiff had been enjoined, at the instance of the Radio Corporation of America, from selling certain goods manufactured by plaintiff; that, of said returned goods that were sold, plaintiff received at the sale the sum of \$210, which it had applied on defendant's indebtedness; that at the time of said sale the goods were "obsolete" and there was no market therefor; and that the price for which they were sold was the best price at the time that could be obtained. Blume, who for plaintiff had made the agreement with defendant as to the goods in question, did not testify by deposition, nor was he called by plaintiff to dispute the testimony of Kromer and Davis.

After reviewing the present record we have reached the conclusion that the judgment should be reversed and the cause remanded for a new trial. We think that the verdict and judgment against defendant for \$399.26 are manifestly against the weight of the evidence. There was no substantial dispute of the testimony of Kromer and Davis as to the purchase of the goods in question being made under an agreement that such goods as proved unsatisfactory might be returned and credit given therefor. And portions of those goods were returned within a reasonable time. And we fail to see upon what possible theory the jury could have arrived at the particular sum awarded to plaintiff. (See, Galomopoulos v. Petreopoulos, 147 Ill. App. 1. 3.) And we think that the trial court erred in not permitting the offered testimony of Davis to be heard by the jury. It is well settled that an executory written agreement between parties may be set aside or modified as they may see fit by a subsequent oral agreement. (Palmer v. Bennett, 96 Ill. App. 281, 283; Commercial Car Line v. Andersen, 224 Ill. App. 187, 191.)

The judgment of the Municipal court is reversed and the cause remanded.
Barnes, P.J., and Wells, J., concur.

REVERSED AND REMANDED.

would portions of the returned goods, and that all of them for
the reason that plaintiff had been advised, at the instance
of the defendant's attorney, that selling certain goods
manufactured by plaintiff, and of said returned goods that
were sold, plaintiff received at the sale the sum of \$2000, which
it had applied on defendant's indebtedness; that at the time of
said sale the goods were "spoiled" and there was no market therefor;
and that the price for which they were sold was the best price at
the time that could be obtained. Hence, the defendant had
made the agreement with defendant as to the goods in question, did
not actually by disposition, nor was he called by plaintiff to dispose
the defendant of them and profits.

After reviewing the present record we have reached the
conclusion that the judgment should be reversed and the cause
remanded for a new trial. The price for the returned and returned
against defendant for \$2000.00 was manifestly against the weight of
the evidence. There was no substantial dispute of the testimony
of Hume and Davis as to the purchase of the goods in question
being made under an agreement that such goods as proved unsalable
thereby might be returned and credit given therefor, and provision
of these goods were returned within a reasonable time, and we fail
to see upon what basis the jury could have arrived at the
questioner was awarded no plaintiff. (See, Wilmington v.

Wilmington, 107 Ill. App. 1-2.) and we think that the trial
court erred in not permitting the offered testimony of Davis to
be heard by the jury. It is well settled that an agreement written
agreement between parties may be set aside or modified as they may
see fit by a subsequent oral agreement. (Talbot v. Bennett, 66 Ill.
App. 501; Wilmington v. Wilmington, 107 Ill. App. 1-2.)

The judgment of the Appellate court is reversed and
the cause remanded.
REVEREND AND HONORABLE
JAMES P. McNEIL, J., CLERK.

133 - 31743

SAM GREENBERG,
Appellee,
v.
SAM HAYMAN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought a 4th class action in contract to recover of defendant \$650, claimed to be due as rent for the store and premises, owned by plaintiff and known as 832 West 59th street, Chicago, for five months from January to May, 1926, inclusive, at \$130 per month. After a trial without a jury the court allowed plaintiff four months' rent, and entered a finding and judgment against defendant for \$520. This appeal followed. Plaintiff has not appeared or filed any brief in this appellate court.

Plaintiff was a witness in his own behalf. Defendant also testified, as did two witnesses called by him.

The evidence discloses in substance that plaintiff became the owner of the premises about four years prior to January, 1926; that he leased the same to one Aldrin to be used by the latter in the conducting of a "soft drink parlor;" that several months prior to January, 1926, defendant took possession of the premises, with plaintiff's consent, and continued to run the place, and, up to January, 1926, paid a monthly rent of \$130 to plaintiff; that during this period a certain brewery company owned all the furnishings and fixtures, except a cash register which defendant owned; that during this period also defendant constantly violated, with plaintiff's knowledge, the National Prohibition Act by selling

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185 - 11243

ALIAS NAME

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APPEAL

APPEAL

RE. JAMES EARL RAY, PETITIONER FOR WRIT OF HABEAS CORPUS.

Plaintiff brought a 4th class action in contempt to

recovery of defendant \$500, claimed to be due on rent for the

store and premises, owned by Plaintiff and known as 227 1/2

24th Street, Chicago, for five months from January to May, 1936.

Defendant, at \$100 per month. After a trial without a jury the

court allowed Plaintiff four months' rent, and entered a finding

and judgment against defendant for \$500. This appeal followed.

Plaintiff has not appeared or filed any brief in this appeal.

Cont.

Plaintiff was a witness in his own behalf. Defendant

also testified, as did two witnesses called by him.

The evidence disclosed in substance that Plaintiff became

the owner of the premises about four years prior to January, 1936;

that he leased the same to one Davis to be used by the latter in

the conducting of a "soft drink parlor"; that several months prior

to January, 1936, defendant took possession of the premises, with

Plaintiff's consent, and continued to run the place, and, up to

January, 1936, paid a monthly rent of \$100 to Plaintiff; that

during this period a certain grocery company owned all the fix-

tures and fixtures, except a cash register which defendant

owned; that during this period also defendant consistently visited,

with Plaintiff's knowledge, the National Exhibition and by selling

in the store or saloon whiskey and other intoxicating liquors; that about Christmas, 1925, the place was closed temporarily by the police department of Chicago, since which time defendant has not occupied the premises; that defendant did not turn over the key to plaintiff but left it with some one next door; that shortly prior to February 1, 1926, the Federal authorities brought proceedings against plaintiff, and as a result the place was ordered closed for one year and the doors pad-locked; that in April or May, 1926, upon plaintiff filing a petition and giving bond, etc., a Federal court allowed plaintiff to re-open the premises, which he did, replacing the old lock with a new one; and that at this time the said brewery company removed all the furnishings and fixtures that it owned.

Plaintiff, by virtue of the verbal agreement of the letting of the premises to defendant, sought to recover of him the monthly rental for the five months after the place had been closed and after he had ceased to occupy the same because of said enforced closing. We do not think that under the evidence plaintiff can recover anything of defendant. The evidence clearly discloses that when defendant took possession as plaintiff's tenant he did so with the intention of violating the law in there selling intoxicating liquors and that plaintiff then knew there would be such violations; that defendant, after taking possession continually there sold whiskey and other intoxicating liquors with plaintiff's knowledge and consent; and that the place was closed by the Federal authorities because of said violations of the law. Under such circumstances defendant's agreement to pay rent should not be enforced on the ground of public policy. (Nash v. Monheimer, 20 Ill. 215, 217; Goodrich v. Tenney, 144 Ill. 422, 430; Ryan v. Potwin, 60 Ill. App. 637, 639; Kelly v. Williams, 162 Ill. App. 571, 573.)

The judgment of the Municipal court should be reversed and it is so ordered.

REVERSED WITH FINDINGS OF FACT.

Barnes, P. J., and Wells, J., concur.

In the store on Nelson Highway and other interesting places; that about Christmas, 1938, the place was closed temporarily by the police department of Chicago, since which time defendant has not occupied the premises; that defendant did not turn over the key to plaintiff until but left it with some one next door; that shortly prior to February 1, 1941, the Federal authorities brought proceedings against plaintiff, and as a result the place was ordered closed for two years and the door pad-locked; that in April or May, 1940, upon plaintiff's filing a petition and giving bond, etc., a Federal court allowed plaintiff to re-open the premises, which he did, replacing the old lock with a new one and since that time the said property company removed all the furnishings and fixtures that it owned. Plaintiff, by virtue of the verbal agreement of the locking of the premises as defendant, sought to recover of him the monthly rental for the five months after the place had been closed and after he had ceased to occupy the same because of said entrance closing. He does not think that under the evidence plaintiff can recover any-thing of defendant. The evidence clearly discloses that when defendant took possession as plaintiff's tenant he did so with the intention of violating the law in there selling intoxicating liquors and that plaintiff then knew there would be such violations; that defendant, after taking possession negligently there sold whiskey and other intoxicating liquors with plaintiff's knowledge and consent; and that the place was closed by the Federal authorities because of said violations of the law. Under such circumstances defendant's agreement to pay rent should not be enforced on the ground of public policy. (Wynn v. Rosenbaum, 80 Ill. 215, 217; Goodrich v. Tamm, 144 Ill. 432, 433; King v. Smith, 60 Ill. App. 237, 239; Hall v. Williams, 102 Ill. App. 271, 273.) The judgment of the Municipal Court should be reversed and it is so ordered.

REVEREND WITH FINDING OF FACT.

Barnes, P. J., and Collins, J., concur.

133 - 31743

FINDINGS OF FACT.

We find as facts in this case that when plaintiff leased the premises to defendant the latter intended as tenant to violate the existing law by selling therein whiskey and other intoxicating liquors and that plaintiff then knew of such intention; that after defendant took possession of the premises, paying rent therefor, and until about Christmas, 1926, he continuously violated the law by making sales of intoxicating liquors, with the knowledge, consent and acquiescence of plaintiff; and that the building on the premises was closed by the Federal authorities because of the making of said illegal sales.

TO THE HONORABLE MEMBERS OF THE HOUSE OF REPRESENTATIVES
IN SENATE - 1945

WITNESS OF FACT.

It is the duty of the House of Representatives to inquire into the conduct of the President of the United States in the exercise of his powers and to report the results of its inquiry to the Senate. In the present case, the House has the honor to report to the Senate the results of its inquiry into the conduct of the President in the exercise of his powers in the matter of the removal of the Secretary of the Interior.

The House has the honor to report to the Senate that the President has acted in a manner which is in violation of the law by ordering the removal of the Secretary of the Interior without the consent and recommendation of the Senate. The House has the honor to report to the Senate that the President has acted in a manner which is in violation of the law by ordering the removal of the Secretary of the Interior without the consent and recommendation of the Senate.

The House has the honor to report to the Senate that the President has acted in a manner which is in violation of the law by ordering the removal of the Secretary of the Interior without the consent and recommendation of the Senate. The House has the honor to report to the Senate that the President has acted in a manner which is in violation of the law by ordering the removal of the Secretary of the Interior without the consent and recommendation of the Senate.

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The House has the honor to report to the Senate that the President has acted in a manner which is in violation of the law by ordering the removal of the Secretary of the Interior without the consent and recommendation of the Senate. The House has the honor to report to the Senate that the President has acted in a manner which is in violation of the law by ordering the removal of the Secretary of the Interior without the consent and recommendation of the Senate.

The House has the honor to report to the Senate that the President has acted in a manner which is in violation of the law by ordering the removal of the Secretary of the Interior without the consent and recommendation of the Senate. The House has the honor to report to the Senate that the President has acted in a manner which is in violation of the law by ordering the removal of the Secretary of the Interior without the consent and recommendation of the Senate.

OTIS BREMAN,
Appellee,

v.

A. A. MORRISON CO.,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in tort, tried without a jury, there was a finding and judgment against defendant for \$195, and this appeal followed.

In plaintiff's amended statement of claim he alleged that on January 13, 1925, he was possessed of a certain dwelling house in Oak Park, Illinois; that on that day certain of defendant's servants entered the house and "negligently built a fire" in the heating plant and so damaged the same as to require repairs; and that in making the repairs plaintiff expended the sum of \$195, etc. In its affidavit of merits defendant denied that it or its servants ever built or caused to be built any fire in the heating plant, or that the claimed damage thereto was caused by any acts of it or its servants.

It appears from the evidence that plaintiff had agreed to buy a newly constructed house from one Schumann; that the latter had agreed to pay for the furnishing and installation therein by defendant of certain electric light fixtures; that it was arranged that plaintiff should go to defendant's place of business and select the fixtures; that he made the selections on January 9, 1925; that on the morning of Tuesday, January 13, 1925, the fixtures were delivered to the house by defendant's truck; that the driver of the truck was one Williams and he was accompanied by one Priddy,

WILLIAM W. WILLIAMS

Plaintiff,

v.

A. A. WILLIAMS CO.,

Defendant.

THE COURT HEREBY GRANTS THE MOTION OF THE DEFENDANT.

In a 4th class action in fact, filed without a jury, there was a finding and judgment against defendant for \$100, and this appeal followed.

In plaintiff's amended statement of claim he alleged that on January 13, 1933, he was possessed of a certain dwelling house in Oak Park, Illinois; that on that day certain of defendant's servants entered the house and "negligently built a fire" in the heating plant and so damaged the same as to require repairs; and that in making the repairs plaintiff expended the sum of \$100, etc. In his affidavit of merits defendant denied that it or its servants ever built or caused to be built any fire in the heating plant, or that the claimed damage thereto was caused by any acts of it or its servants.

It appears from the evidence that plaintiff had agreed to buy a newly constructed house from one defendant; that the latter had agreed to pay for the heating and installation thereof by defendant of certain electric light fixtures; that it was arranged that plaintiff should go to defendant's place of business and select the fixtures; that he made the selections on January 2, 1933; that on the morning of Tuesday, January 13, 1933, the fixtures were delivered to the house by defendant's truck; that the driver of the truck was one Williams and he was accompanied by one Friday;

an electrician employed by defendant, who was to hang the fixtures, and who did so during that day; and that before the fixtures were carried into the house Williams obtained a key to one of the doors thereof from a Mrs. Rollins, an employee of plaintiff's father-in-law, living nearby, and, after the fixtures had been hung, returned the key to her on the same day.

Plaintiff testified that on Sunday, January 11, 1925, he visited the house and found it vacant and locked up; that he went into the basement, and "there was no water on the floor nor any evidence of any fire having been in the boiler;" that, after the fixtures had been hung, he again visited the house on Saturday, January 17, 1925, with one Johnson, an agent of Schumann, who tried to start a fire in the plant; that Johnson turned on the water but it "wouldn't run, because it was frozen;" that then "there was some ice on the basement floor near the bottom of the furnace;" and that afterwards he employed R. J. Tropf, a heating contractor, to make necessary repairs to the plant and that Tropf completed these repairs. Mrs. Rollins testified that, on the day she gave the key to Williams, he inquired if there was a fire in the house, and, upon her saying that she didn't know, he further said: "It is pretty cold to work there without a fire." J. B. Wright, a teamster for a coal company, testified that about noon on Tuesday, January 13, 1925, he delivered a load of coal at the house; that, although he had procured from his employer a key to one of the doors, he did not use it, because when he arrived he found some of the basement windows open, entered through one of them, opened the window to the coal bin, and through it delivered the coal; that when he first entered the basement he noticed "there was water on the floor and smoke in the basement," but that he "didn't notice any fire;" that, before he had finished delivering the coal, Priddy, the fixture hanger, returned from his

an electrician employed by defendant, who was to hang the fixtures and who did so during that day; and that before the fixtures were carried into the house Williams obtained a key to one of the doors thereof from a Mrs. Collins, an employee of plaintiff's father-in-law, living nearby, and, after the fixtures had been hung, returned the key to her on the same day.

Plaintiff testified that on Sunday, January 11, 1933, he

visited the house and found it vacant and locked up; that he went into the basement, and "there was no water on the floor nor any evidence of any fire having been in the boiler;" that, after the fixtures had been hung, he again visited the house on Saturday, January 17, 1933, with one Johnson, an agent of defendant, who tried to start a fire in the plant that Johnson turned on the order but it "didn't burn, because it was frozen;" that then "there was some ice on the basement floor near the bottom of the furnace," and that

afterwards he employed E. J. Tracy, a heating contractor, to make necessary repairs to the plant and that Tracy completed these repairs.

Tracy testified that on the day the key was given to Williams he inspected it and saw a fire in the house, and, upon not seeing that the didn't know, he further said: "It is pretty cold so work there without a fire." J. E. Wright, a foreman for a coal company, testified that about noon on Tuesday, January 15, 1933, he delivered a load of coal at the house; that, although he had procured from his employer a key to one of the doors, he did not use it, because when

he arrived he found some of the basement windows open, entered through one of them, opened the window to the coal bin, and through it delivered the coal; that when he first entered the basement he noticed "there was water on the floor and smoke in the basement," but that he "didn't notice any fire;" that, before he had finished delivering the coal, Tracy, the heating engineer, returned from his

lunch and resumed his work of hanging the fixtures; and that about one o'clock he (the witness) had put all the coal into the basement, and closed the windows to the coal bin but "left the side windows open." Trepf, who afterwards repaired the heating plant at plaintiff's request and charged him \$195 for doing the work, testified that such charge was a reasonable one, etc. He further testified that, "on a Saturday afternoon" in January, 1925, (probably January 24th, more than 10 days after defendant's employees had been in the house), he in company with plaintiff, inspected the heating plant; that the witness then found "very little water in the boiler," that "there had been a fire started in it and the three main sections of it were cracked," and that "the effect of starting a fire in such a boiler without water in it is to crack a section or more of it." On cross-examination he testified that when he examined the boiler on the Saturday afternoon "there was no water in it;" that he "couldn't tell whether there had been any water in it before;" that, "if there had been water in it, it would never have broken;" that "if water had been left in it and the water had been permitted to freeze it would have broken;" that "the cracks I then saw in the boiler might have been there for a week for all I know;" that "the cracks I examined appeared to me like fresh breaks;" and that he "found no damage to the plant except said three sections of the boiler." Plaintiff did not call either Johnson or Schumann as witnesses.

At the conclusion of plaintiff's evidence defendant moved for a finding in its favor, but the motion was denied. Thereupon, on defendant's behalf, Williams, the driver of its truck, testified as to the acts and doings of Priddy and himself at the house on January 13, 1925. Priddy was not present in court and did not testify, but it was stipulated that if he were present he would testify that while he was in the house "he did not tamper with the

Joseph and returned his work of hanging the pictures; and that about
 one o'clock he (the witness) had put all the coal into the basement
 and closed the windows to the coal bin but "left the side window
 open." Then, the attorney repaired the heating plant at plain-
 tiff's request and charged him \$125 for doing the work. Testified
 that such charge was a reasonable one, etc. He further testified
 that, "on a Saturday afternoon" in January, 1935, (probably January
 24th, more than 12 days after defendant's employees had been in the
 house), he in company with plaintiff, inspected the heating plant;
 that the witness then found "very little water in the boiler," that
 "there had been a fire started in it and the three main sections of
 it were cracked," and that "the effect of starting a fire in such a
 boiler with oil water in it is to crack a section or part of it."
 On cross-examination he testified that when he examined the boiler
 on the Saturday afternoon "there was no water in it," that he
 "couldn't tell whether there had been any water in it before";
 that, "if there had been water in it, it would never have frozen";
 that "if water had been left in it and the water had been permitted
 to freeze it would have frozen"; that "the reason I saw now in the
 boiler after it had been there for a week or all I know"; that "the
 cracks I examined appeared to me like fresh cracks"; and that he
 "found no damage to the plant except said three sections of the
 boiler." Plaintiff did not call either Johnson or Johnson as
 witnesses.
 At the conclusion of plaintiff's evidence defendant moved
 for a finding in his favor, but the motion was denied. Thereupon,
 on defendant's behalf, William, the driver of the truck, testified
 as to the acts and things of which he himself is the best
 witness. He testified that he was not present in court and did not
 testify, but it was stipulated that if he were present he would
 testify that while he was in the house "he did not touch with the

water system or the heating system in the premises, " * did not turn on any water, or light any fire of any kind in the premises." Williams' testimony was to the same effect.

After reviewing the testimony we are of the opinion that the finding and judgment are manifestly against the evidence, and that the judgment must be reversed. There was no direct evidence introduced by plaintiff to sustain the charge that on January 13, 1925, defendant's said employees "negligently built a fire" in the heating plant and damaged the same. Such evidence as he did introduce was circumstantial and unsatisfactory. One of his witnesses, Wright, testified that on that day, after defendant's employees had entered the house and had delivered the fixtures therein and had commenced the work of hanging them, he observed water on the basement floor and "smoke in the basement," and other witnesses testified that a few days thereafter the heating plant was found to be in a damaged condition, requiring repairs. Plaintiff's case, as made out by him, rests upon too many presumptions of fact. It must be presumed that the smoke which Wright observed in the basement was caused by a then existing fire in the heating plant. It must also be presumed that such fire was kindled by defendant's said employees, which they positively deny doing. And it must also be presumed that the damage to the heating plant was caused by such a fire so kindled by them. "The law is that a presumption cannot be based upon a presumption." (Globe Accident Ins. Co. v. Garisch, 163 Ill. 625, 629; Condon v. Schoenfeld, 214 id. 226, 230.) Furthermore, it is the law that circumstantial evidence "is always insufficient, where, assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true, for it is the actual exclusion of every other hypothesis which invests mere circumstances with the force of proof." (1 Starkie Ev. 444; Tuthill v. Belt Railway, 145 Ill. App. 50, 54.)

The judgment of the Municipal Court is reversed.

REVERSED WITH FINDINGS OF FACT.

Barnes, P. J., and Wells, J., concur.

water system of the heating system in the premises, " & did not
turn on any water, or light any fire or any kind in the premises."

Williams' testimony was to the same effect.

After reviewing the testimony we are of the opinion

that the finding and judgment are manifestly against the evidence,

and that the judgment must be reversed. There was no direct evi-

dence introduced by plaintiff to sustain the charge that on

January 12, 1932, defendant's said employee negligently built

a fire in the heating plant and damaged the same. Such evidence

as he did introduce was circumstantial and uncorroborated.

of his witness, right. It is also true that on that day, after a fire

and a employee had entered the house and had delivered the fire

therein and had commenced the work of heating there, he observed

water on the basement floor and "smoke in the basement," and other

witnesses testified that a few days thereafter the heating plant was

found to be in a damaged condition, requiring repairs. Plaintiff's

case, as made out by him, rests upon too many presumptions of fact.

It must be presumed that the smoke which might be observed in the house

must have been caused by a fire existing in the heating plant. It

must also be presumed that such fire was kindled by defendant's said

employee, which they positively deny doing. And it must also be

presumed that the damage to the heating plant was caused by such a

fire as kindled by them. "The law is that a presumption cannot be

based upon a presumption." (Riggs v. Commonwealth, 100 Pa. 401.)

And in the case of Commonwealth v. Commonwealth, 110 Pa. 401, further-

more, it is the law that circumstantial evidence "is always insufficient

where, assuming all to be proved which the evidence tends to prove,

some other hypothesis may still be true; for it is the actual exclusion

of every other hypothesis which invests mere circumstances with the

force of proof." (1 Starkie v. 444; 100 Pa. 401.)

The judgment of the Municipal Court is reversed.

REVEREND WITH FINDINGS OF FACT.

Reimer, P. J., and Wells, J., concur.

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FINDINGS OF FACT.

We find as facts in this case that defendant's servants did not on January 13, 1925, or at any time, build or cause to be built a fire in plaintiff's said heating plant, and that the damage to said plant was not caused by any acts of defendant or its said servants.

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WILLIAM EISENSTADT,
Appellant,

v.

INTERSTATE PACKING COMPANY,
a corporation,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE CHIRLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action for damages for alleged breach of contract because of defendant's refusal to ship and deliver 100 tierces of white grease at 10 cents per pound, there was a trial without a jury, resulting in the court, on December 4, 1926, finding the issues against plaintiff and entering a judgment against him for costs.

The court held in substance that the evidence did not sufficiently show that defendant had agreed to sell and deliver the grease to plaintiff. Whether the holding is contrary to the law and the evidence is the only question involved in the present appeal.

Plaintiff is a dealer in tallow and grease at Chicago, and defendant is a seller of those commodities with principal office at Winona, Minnesota. John W. Hall is a licensed tallow and grease broker, doing business at Chicago, and he, in the transaction in question, acted as agent for both parties. He had previously acted as agent for defendant in making sales for it of other grease. Plaintiff claimed that he had purchased the grease in question for re-sale and had re-sold it to a customer. When in August, 1924, defendant refused to deliver it, plaintiff, after notice, purchased 100 tierces of grease of the same quality in the open market at 12 cents per pound (an increase of 2 cents),

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100 - 1177

COURT OF CHICAGO
APPEAL FROM JUDGMENT

WILLIAM KIMMELT,
Appellant,
v.
INTERNATIONAL PACKING COMPANY,
a corporation,
Appellee.

NO. 100-1177, JUDGMENT GRANTED BY THE COURT.

In a civil action for damages for alleged breach of contract between defendant's vessel and plaintiff, 100 barrels of white grease at 10 cents per pound, there was a trial without a jury, resulting in the court, on December 4, 1934, finding the law in favor of plaintiff and entering a judgment against him for costs.

The court held in substance that the evidence did not sufficiently show that defendant had agreed to sell and deliver the grease to plaintiff. Whether the holding is contrary to the law and the evidence is the only question involved in the present appeal.

Plaintiff is a dealer in tallow and grease at Chicago, and defendant is a seller of these commodities with principal office at Winona, Minnesota. John W. Hall is a licensed tallow and grease broker, doing business at Chicago, and he, in the transaction in question, acted as agent for both parties. He had previously acted as agent for defendant in making sales for it of other grease. Plaintiff claimed that he had purchased the grease in question for re-sale and had re-sold it to a customer. When in August, 1934, defendant refused to deliver it, plaintiff, after notice, purchased 100 barrels of grease at the same quality in the open market at 10 cents per pound (an increase of 2 cents).

and it was stipulated upon the trial that, in the event the court should find that an agreement actually existed between the parties for the sale by defendant of the grease in question at 10 cents per pound, the measure of plaintiff's damages would be 2 cents per pound for 3600 pounds, or \$720. Plaintiff was a witness in his own behalf and the broker, Hall, also testified for him. By agreement numerous telegrams, letters and other writings were introduced in plaintiff's behalf. P. A. Jacobson, president of defendant, testified for it, and other telegrams, letters and writings offered by it were received in evidence.

On the morning of July 11, 1924, plaintiff called on Hall and offered to purchase through him "a carload of all hog grease, at \$9.62-1/2, New York, to be delivered in July or August of 1924." Hall then stated that he would submit the offer by wire to defendant and would advise plaintiff later in the day. He immediately wired defendant at Winona as follows: "Subject to your immediate reply by wire, bid \$9.62-1/2, New York, car all hog, July or August; answer immediately by wire." Before noon of that day defendant wired him in reply, as follows: "Offer too low. Could fill as follows: 100 tierces, all hog, \$10, C.A.F., New York. Sell subject to confirmation. Answer immediately by wire." On the afternoon of that day plaintiff again saw Hall, and told him that he (plaintiff) would buy the grease at the increased price, and requested Hall to enter his order for the 100 tierces for delivery during August, at the price of \$10, New York, and to immediately wire defendant to that effect. Whereupon Hall on that afternoon (July 11th) wired defendant as follows: "Booked 100 tierces, all hog, August, \$10, New York, Thanks." This telegram was received by defendant, and on the following morning (July 12th) it wired Hall as follows: "Cannot confirm sale grease. Afraid quality. Mailing sample." And defendant under date of July 12th mailed a letter to

and it was stipulated upon the trial that, in the event the court should find that an agreement actually existed between the parties for the sale by defendant of the gross in question at 10 cents per pound, the measure of plaintiff's damages would be 2 cents per pound for 2500 pounds, or \$500. Plaintiff was a witness in his own behalf and the brother, Helli, also testified for him. By agreement numerous telegrams, letters and other writings were introduced in plaintiff's behalf. F. A. Jacobson, president of defendant, testified for it, and other telegrams, letters and writings offered by it were received in evidence.

On the morning of July 11, 1906, plaintiff called on Helli and offered to purchase through him "a carload of all day greens" at \$2.50-1/2, New York, to be delivered in July or August of 1906. Helli then stated that he would submit the offer by wire to defendant and would advise plaintiff later in the day. He immediately wired defendant at Lincoln as follows: "Carload of your immediate reply by wire, bid \$2.50-1/2, New York, per all day. Helli H." Helli answered immediately by wire: "Before noon of that day defendant wired him in reply as follows: 'Offer too low. Double till as follows: 100 dozens, all day, \$2.50, O.A.V., New York. Helli H.'"

Helli replied as follows: "Answer immediately by wire." On the afternoon of that day plaintiff again saw Helli, and told him that he (plaintiff) would pay the gross at the increased price, and requested Helli to enter his order for the 100 dozens for delivery during August, at the price of \$2.50, New York, and to immediately wire defendant to that effect. Thereupon Helli on that afternoon (July 11th) wired defendant as follows: "Booked 100 dozens, all day, August, \$2.50, New York, Thanks." This telegram was received by defendant, and on the following morning (July 12th) it wired Helli as follows: "Cannot confirm sale greens. Helli H. Helli H." and defendant under date of July 12th mailed a letter to

Hall as follows: "Referring to exchange of messages, we wanted to book the 100 tierces all hog for August, but before doing so we want to know that the product is right and there will be no back-fire. Accordingly, we are sending you sample of all hog by parcel post to-day. * * We might add that we can get out 100 tierces this month, if that is any advantage, and with higher market for lard no doubt you can get better than 10¢ for it. Please let us hear from you." Before defendant's telegram and letter last above mentioned had been received by Hall, he, on July 12th, mailed to each of the parties, in confirmation of the sale, the usual broker's bought and sold notes or memoranda and the same afterwards in due course of mail were received by each. The memoranda are signed by Hall "as broker only" and are as follows:

"SALE NUMBER 4404	Dated, July 12th, 1924.
SELLER	Interstate Packing Company, Winona, Minn.
BUYER	Wm. Eisenstadt, Chamber of Commerce Bldg., Chicago, Ill.
QUANTITY	100 barrels
ARTICLE	Choice white all hog grease
QUALIFICATIONS.	Guaranteed usual good quality, maximum 3. Seller to furnish usual export documents, such as B.A.I. Certificate of Analysis, etc.
SHIPMENT.	August. Instructions later.
PRICE.	10¢ per lb. C.A.P. New York.
TERMS.	2D/BL attached.
	Send copy of invoice to this office.
BROKERAGE.	Sellers. 1%."

On July 12th, after Hall had received defendant's telegram of that date, saying that it could not confirm the sale because "afraid quality" and that it was mailing a sample of the grease, plaintiff was advised by Hall of the contents of the telegram. On the morning of July 14th, the sample of the grease mailed by parcel post by defendant having been received, plaintiff examined the same and told Hall that it was satisfactory, and instructed Hall to advise defendant by wire to that effect. Thereupon Hall immediately wired defendant as follows: "Sample white grease

satisfactory. Buyer confirms. With firm offer think can sell car July same price." The last sentence of this telegram evidently has reference to other negotiations then being had between Hall and plaintiff. They both testified to the effect that Hall then was urging plaintiff to order another car of the same grade of grease at the same price, New York, for July delivery, but that nothing came of these negotiations. Hall's said telegram was received by defendant on the afternoon of July 14th. It had previously received by mail Hall's said note or memorandum of July 12th, confirming the sale to plaintiff of the 100 tierces of grease in question for August delivery, and it did not then, or within a reasonable time thereafter, repudiate said sale, - it then being advised by said telegram that the sample of the grease submitted was satisfactory to plaintiff. All it did on that day was to wire Hall as follows: "Answer to your message just received. Can't you do better than \$10 on white grease? Answer immediately by wire;" to which Hall sent an answering telegram, as follows: "No cable bids to-day. \$10 absolutely top, so far." On July 31, 1924, plaintiff wrote defendant as follows: "Referring to the 100 tierces choice white grease purchased from you through J. W. Hall, No. 4404, would ask you to advise me by return mail when you expect to have this material ready for shipment, and I will furnish you with shipping instructions covering." To this letter defendant replied on August 1, 1924, in part as follows: "Your letter of the 31st received. There must be some mistake about this as we have not booked any grease for you." This was the first intimation received by plaintiff that defendant claimed that his order for the 100 tierces of grease in question for August delivery had not been accepted. There was further evidence tending to show that if, on July 14, 1924, or within a reasonable time thereafter, he had been advised of defendant's position, he could then have purchased in the open market

satisfactory. They continue. With this offer which can well be
 like some price. The last sentence of this telegram obviously
 has reference to other negotiations then being had between Hall
 and plaintiff. They both testified to the effect that Hall was
 was writing plaintiff to order ~~plaintiff~~ out of the same price of
 goods at the same price, New York, for July delivery. But that
 nothing came of these negotiations. Hall's said telegram was
 received by defendant on the afternoon of July 14th. It had pre-
 viously received by Hall Hall's said note on memorandum of July
 13th, containing the note to plaintiff of the 1st instance of goods
 in question for August delivery, and it did not show or contain a
 reasonable time thereafter, plaintiff said note, - it then being
 advised by said telegram that the goods of the present instance were
 satisfactory to plaintiff. All it did on that day was to give Hall
 as follows: "never to your message just received. Can't you do
 better than this on this message? Answer immediately by wire" by
 which Hall sent an answering telegram, as follows: "He could ship
 to-day. His absolutely say, as far as on July 14, 1924, plaintiff
 wrote defendant as follows: "Referring to the 100 dozen shoes
 which you purchased from you through J. W. Hall, No. 4404, would
 you please to advise me by return mail when you expect to have this
 material ready for shipment, and I will furnish you with shipping
 instructions covering." To this letter defendant replied on August
 1, 1924, in part as follows: "Your letter of the 1st received.
 There must be some mistake about this as we have not booked any
 goods for you." This was the first intimation received by plaintiff
 that defendant claimed that his order for the 100 dozen of goods
 in question for August delivery had not been accepted. There was
 further evidence tending to show that it, on July 14, 1924, or
 within a reasonable time thereafter, he had been advised of defen-
 dant's position, he could then have purchased in the open market

the same quality of grease, at 10 cents per pound, C.A.F. New York. During the month of August and thereafter considerable correspondence passed between Hall, the broker, and defendant, the former maintaining that plaintiff's order for the grease in question had been accepted by defendant, and the latter maintaining that it had never confirmed any sale thereof. In one letter Hall wrote defendant in part as follows:

"In starting out this trade, we bid you 9-5/8, New York. You came back with an offering, subject to confirmation, of 10¢. We wired you the same day booking the car at your asking price, and up to the close of business, not receiving anything from you one way or the other, naturally assumed it was o.k., and the contracts were sent out. The next day you wired 'cannot confirm - afraid of quality,' and followed this up with a letter to the effect that you wanted to book the car, but, before doing so, preferred that we see a sample. In other words, you sold the car subject to approval of sample. Immediately upon receipt of same, we wired you that the sample was satisfactory. In reply to this wire, you answered us in a rather ambiguous way and we immediately answered your wire, and, according to your own file on the subject, it was apparently closed then and there."

After reviewing the present transcript we are of the opinion that the finding and judgment of the trial court are manifestly contrary to the evidence and the law and that the judgment cannot stand, and (in view of the stipulation of the parties made during the trial) that judgment should be entered in this appellate court against defendant in the sum of \$720. The evidence clearly discloses that on July 12, 1924, defendant offered to sell through the broker, Hall, to his customer (plaintiff) the grease in question at a price mentioned by defendant, provided only the sample of grease submitted by it was satisfactory to the customer, and that, when on July 14, 1924, the customer (plaintiff), agreeing to the price and to delivery in August, examined the submitted sample and said it was satisfactory to him, and defendant was notified of that fact by the broker and that the sale had been "booked," a contract of sale of the grease, binding

The same quality of evidence, at 10 cents per pound, G.A.V. New York. During the month of August and September considerable correspondence passed between Hall, the broker, and defendant, the latter maintaining that plaintiff's order for the goods in question had been accepted by defendant, and the latter maintaining that it had never confirmed any sale himself. In defendant's letter to

defendant in part as follows:

"In sending me this check, we had you \$4.00, New York. You came back with an order, dated 10th of August, at 10c. We wired you the same day, saying the one of your selling price, and up to the close of the day, not receiving anything from you one way or the other. Naturally assuming it was a.k., and the contract was made. The next day you wired 'cancel contract' - and followed this up with a letter to the effect that you wanted to back the order, but, saying so, quoted that we were a sample. In other words, you said that you wanted to cancel at 10c. Immediately upon receipt of same, we wired you that the sample was satisfactory. In reply to this wire, you answered us in a letter indicating that we immediately returned your wire, and, according to your own file on the subject, it was accordingly closed then and there."

After reviewing the present transcript we are of the opinion that the finding and judgment of the trial court are manifestly contrary to the evidence and the law and that the judgment cannot stand, and (in view of the stipulation of the parties made during the trial) that judgment should be entered in this appellate court against defendant in the sum of \$750. The evidence clearly shows that on July 12, 1924, defendant offered to sell through the broker, Hall, to his customer (plaintiff) the goods in question at a price mentioned by defendant, provided only the sample of goods submitted by it was satisfactory to the customer, and that, when on July 14, 1924, the customer (plaintiff), agreeing to the price and to delivery in August, examined the submitted sample and said it was satisfactory to him, and defendant was notified of that fact by the broker and that the sale had been "booked," a contract of sale of the goods, standing

upon defendant and said customer, was consummated. Furthermore, it is decided in Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, 590, that a principal, who fails to repudiate a sale by his broker within a reasonable time after receiving a sale's ticket evidencing the transaction, must be held to have ratified the transaction and is bound thereby. Although in the present case it appears that the broker, Hall, mailed his sale tickets (or bought and sold notes or memoranda) to both parties possibly somewhat prematurely, still it clearly appears that defendant, after the receipt by it of such sale's ticket and after it was notified by the broker that the sample of the grease submitted was satisfactory to plaintiff (the buyer), did not within a reasonable time repudiate the purported sale.

The judgment of the Municipal court is reversed and judgment for \$720 will be entered here against defendant and in favor of plaintiff.

REVERSED AND JUDGMENT HERE AGAINST DEFENDANT
FOR \$720 WITH FINDINGS OF FACT.

Gridley and Wells, JJ., concur.

upon retirement and said otherwise, was considered. Furthermore,
it is decided in the case of the 12. 7. 1934 1934 1934
his ill. 1934, that a judgment, who fails to recognize a sale
by his estate within a reasonable time after receiving a sale's
check evidencing the transaction, must be held to have ratified
the transaction and is bound thereby. Although in the present case
it appears that the present, well, raised his own claims (as
bought and sold under an agreement) as well as his personal property, some-
what previously, still it clearly appears that defendant, after
the receipt of 10 of such sale's check and after it was ratified
by the present that the receipt of the present constituted ratifica-
tion to plaintiff (the paper), did not obtain a reasonable time
to recognize the purported sale.

The judgment of the Municipal Court is reversed and
judgment for \$100 will be entered here against defendant and in
favor of plaintiff.

REVEREND AND HONORABLE JUDGE
FOR THE DISTRICT OF COLUMBIA

Stidley and Wells, Att., Counsel.

166 - 31777

FINDINGS OF FACT.

We find as facts in this case that on July 12, 1924, defendant offered to sell the grease in question to Hall's customer (plaintiff) for delivery during August, 1924, at the price of 10 cents per pound, C.A.F., New York, provided only that a sample of the grease to be submitted by defendant was satisfactory to said customer; that said customer agreed to the price and time and place of delivery, and, upon submission of such sample, examined it and stated that it was satisfactory to him, of which fact, and of the further fact that a sale of said grease upon said terms had been made to said customer (plaintiff), defendant received notice from Hall, on July 14, 1924; and that defendant upon receiving such notice did not then, or within a reasonable time thereafter, repudiate such sale upon said terms.

IN RE: THE ESTATE OF JAMES H. HARRIS, DECEASED.

IN SENATE, JANUARY 14, 1924.

REPORT OF THE COMMISSIONER OF THE LAND OFFICE.

IN SENATE, JANUARY 14, 1924.

It is the policy of the State in this case that on July 12,

1924, the State should be sold the ground in question

to the State (plaintiff) for delivery during 1924,

1924, at the price of 10 cents per pound. S. A. T. New York.

provided only that a sample of the ground to be submitted

by defendant was satisfactory to said plaintiff; that said

plaintiff agreed to the price and time and place of delivery,

and, upon submission of such sample, examined it and stated

that it was satisfactory to him, of which fact, and of the

fact that a sale of said ground upon said terms had

been made to said plaintiff (plaintiff), defendant received notice

from Hall, on July 14, 1924; and that defendant upon receiving

such notice did not then, or within a reasonable time thereafter,

repudiate such sale upon said terms.

AUGUST SANDBERG and
MARY SANDBERG,
Appellees,

v.

SAMUEL L. COOPER,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE GRIBLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in contract, commenced in the Municipal court of Chicago on June 24, 1924, there was a verdict and judgment for \$1,000 against defendant upon a second trial, and he appealed.

Plaintiffs' statement of claim is in the form of two counts, in the first of which the only allegation is that on April 20, 1923, defendant became indebted to them in the sum of \$1,000 for money before that time received by him for their use. In the second count they alleged that on April 13, 1924, at Chicago, they entered into a written contract with Charles Biesel and Fannie C. Biesel for the purchase of an apartment building, located at Nos. 5357-59 Dorchester avenue, Chicago, for the agreed consideration of \$40,000 (a copy of the contract is attached and made a part of "these pleadings"); that on April 18, 1924, they paid \$1,000 to defendant, who was the real estate broker and agent of the Biesels; that said payment was for "earnest money", and was to apply "as the initial payment and as part of the purchase price"; that when plaintiffs signed the contract defendant "fraudulently represented to them that there was a certain amount of indebtedness and incumbrances upon the premises;" that these representations, upon which they relied, were false and known to be such by defendant and were made for the purpose of

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133 - 11250

APPEAL FROM NINETEEN

COURT OF CHIEF

AND
MAY 1934

Appellate

v.

WILLIAM L. COOPER

Appellant

MR. JUSTICE BRIDGES DELIVERED THE OPINION OF THE COURT.

In a case which is somewhat unusual in its
history, the court of appeals on June 14, 1934, there was a reversal
and judgment for \$1,000 against defendant upon a second trial.

and the appeal. In the first trial, the
plaintiff's statement of claim in the form of two
counts, in the first of which the only allegation is that on

April 30, 1933, defendant had been indebted to him in the sum of
\$1,000 for money which was received by him for their use.

In the second count they alleged that on April 15, 1934, at
Chicago, they entered into a written contract with Charles Henry

and Francis G. Hissel for the purchase of an apartment building,
located at Nos. 537-539 Rochester Avenue, Chicago, for the agreed
consideration of \$40,000 (a copy of the contract is attached and

makes a part of "these pleadings"); that on April 15, 1934, they
paid \$1,000 to defendant, who was the real estate broker and
agent of the Hissels; that said payment was for "earnest money".

and was to apply "as the initial payment and as part of the purchase
price"; that when plaintiff signed the contract defendant
"falsely represented to them that there was a certain amount

of indebtedness and knowlance upon the premises; that these
representations, upon which they relied, were false and known
to be such by defendant and were made for the purpose of

defrauding plaintiffs and inducing them to enter into the contract; that at that time there were other incumbrances upon the premises which were not made known to them until the day set for the consummation of the sale; that because of said false representations the deal was not consummated; that defendant, well knowing that plaintiffs refused to consummate the sale because of said false representations, "agreed to hold and did hold the \$1,000 in trust for them," yet defendant, notwithstanding his knowledge that the deal was not consummated, "unlawfully converted the \$1,000 to his own use, and in violation of the trust and escrow placed in him;" and that defendant, being so indebted, in consideration thereof, promised plaintiffs to pay to them the said \$1,000, which he has refused to do, etc.

In defendant's amended affidavit of merits he denied that he was indebted to plaintiffs in any sum; denied that he had made any false representations or was guilty of any fraud as charged; denied that he had converted the \$1,000 to his own use; admitted that plaintiffs entered into said contract with the Biesels; and alleged in substance that, after the execution of said contract and the payment of said \$1,000 by plaintiffs and the placing of the same in defendant's hands as earnest money and in escrow, plaintiffs without just cause failed and refused to consummate the transaction.

On the trial plaintiffs introduced the contract in evidence. It is partly printed and partly in typewriting, is dated April 13, 1923, and is signed by the Biesels and plaintiffs. Some of its provisions are as follows: That the Biesels agree to sell and the Sandbergs (plaintiffs) agree to purchase, at the price of \$40,000, an apartment building, consisting of eighteen apartments, at 5337-39 Dorchester avenue, Chicago; that the Biesels agree to

defendant plaintiffs and inducing them to enter into the transaction; that at that time there were other inducements upon the premises which were not known to them until the day after the execution of the sale; that because of said false representations the deal was not consummated; that defendant, Wells, knowing that plaintiff refused to consummate the sale because of said false representations, "agreed to hold and to hold the \$1,000 in trust for them," yet defendant, notwithstanding his knowledge that the deal was not consummated, "unlawfully converted the \$1,000 to his own use, and in violation of the trust and agreed place in which" and that defendant, being so indebted, in consideration thereof, promised plaintiff to pay to them the said \$1,000, which he has refused to do.

In defendant's amended affidavit of denial he denies that he was indebted to plaintiff in any sum; denies that he had made any false representations or was guilty of any fraud or conspiracy; denies that he had converted the \$1,000 to his own use; admitted that plaintiff entered into said contract with the Biscels; and alleged in substance that, after the execution of said contract and the payment of said \$1,000 by plaintiff and the placing of the same in defendant's hands as earnest money and in escrow, plaintiff without just cause failed and refused to consummate the

transaction. On the trial plaintiff introduced the contract in question. It is partly printed and partly in typewriting, is dated April 18, 1922, and is signed by the Biscels and plaintiff. Some of its provisions are as follows: That the Biscels agree to sell and the defendant (plaintiff) agree to purchase, at the price of \$25,000, an apartment building, consisting of eighteen apartments, at 5357-58 Northchester Avenue, Chicago; that the Biscels agree to

execute a first mortgage on the property "for the amount of either \$12,000 or \$15,000," due on or before five years, with interest "not to exceed 7%"; that the Sandbergs have paid \$1,000, "as earnest money," to be applied on the purchase when consummated, and agree to pay, within 3 days after the title has been examined and found good, "the further sum of \$13,500," at the office of Samuel L. Cooper (defendant), Chicago, "provided a good and sufficient warranty deed, conveying to said purchaser a good and merchantable title to said premises, subject as aforesaid (i.e., said 1st mortgage of either \$12,000 or \$15,000) shall then be ready for delivery;" that said payments (i.e. the \$1,000 and the \$13,500, aggregating \$14,500) are to be "in the form of \$6,000 cash, and the second mortgage for \$8,500 on the six apartment building located at 6147-49 Ellis ave." (i. e. a different property) on which property there is a "1st mortgage, being not to exceed \$9,000"; that "the balance of the purchase price" (i.e. \$13,500, if said first mortgage to be executed by the Biesels is \$12,000, or \$10,500, if said mortgage is \$15,000) is "to be made into a second mortgage, payable \$2,500 a year, with interest at 6% per annum, payable monthly." Other provisions of the contract are as follows:

"A complete abstract of title, or merchantable copy, brought down to date, or a merchantable Title Guaranty Policy, or Certificate of Title issued by the Registrar of Cook County, shall be furnished by the vendor within a reasonable time. In case the title upon examination is found materially defective, and so reported, within 10 days after said abstract is furnished, then, unless the material defects be cured within 60 days after written notice thereof, the said earnest money shall be refunded and this contract shall, at the purchaser's option, become null and void.

Should said purchaser fail to perform this contract promptly on his part, at the time and in the manner herein specified, the earnest money paid as above, shall, at the option of the vendor, be forfeited as liquidated damages, and this contract shall be and become null and void.

This contract and earnest money shall be held by Samuel L. Cooper (plaintiff) for the mutual benefit of the parties concerned, and it shall be the duty of said Cooper, in case said earnest money be retained as herein provided, to apply the same, first, to the payment of any expense

execute a first mortgage on the property "for the amount of \$112,000 or \$113,000 or \$114,000, due on or before five years, with interest "not to exceed 7%"; that the said mortgage have paid \$1,000, "as earnest money," to be applied on the purchase when consummated, and agree to pay, within 5 days after the title has been examined and found good, "the further sum of \$12,500," at the office of Samuel E. Cooper (decedent), Chicago, "provided a good and sufficient warranty deed, conveying to said purchaser a good and marketable title to said premises, subject to a first mortgage (i.e., said first mortgage of either \$12,000 or \$13,000) shall then be ready for delivery;" that said payments (i.e., the \$1,000 and the \$12,500, aggregating \$13,500) are to be "in the form of \$5,000 cash, and the second mortgage for \$8,500 on the said apartment building located at 617-19 Illinois st." (1. e. a different property) on which property there is a "first mortgage, being not to exceed \$8,000"; that "the balance of the purchase price" (i.e. \$12,500, if said first mortgage is to be extended by the decedent to \$12,000, or \$13,500, if said mortgage is \$13,000) is "to be made into a second mortgage, payable \$1,500 a year, with interest at 6% per annum, payable monthly." Other provisions of the contract are as follows:

"A complete abstract of title, or marketable copy, brought down to date, or a marketable title insurance policy, or certificate of title issued by the Registrar of Cook County, shall be furnished by the vendor within a reasonable time. In case the title upon examination is found materially defective, and so reported, within 10 days after said abstract is furnished, then, unless the material defects be cured within 30 days after written notice thereof, the said earnest money shall be returned and this contract shall, at the purchaser's option, become null and void.

Should said purchaser fail to return this contract promptly on his part, at the time and in the manner herein specified, the earnest money paid as above, shall, at the option of the vendor, be forfeited as liquidated damages, and this contract shall be and become null and void.

This contract and earnest money shall be held by Samuel E. Cooper (decedent) for the mutual benefit of the parties hereto, and it shall be the duty of said decedent, in case said earnest money be retained as herein provided, to apply the same, first, to the payment of any expenses

incurred for the vendor by his agent in said matter, and second, to the payment to the vendor's broker of a commission of ___ per cent on the selling price herein mentioned for services in procuring this contract, rendering the overplus to the vendor."

On the trial both of the plaintiffs testified, as well as three witnesses for them. Their testimony failed to show that, prior to or at the time of the signing of the contract, defendant made any false representations, regarding incumbrances on the premises, or otherwise, which induced plaintiffs to attach their signature thereto, or that he was guilty of any fraud in the negotiations, or that, after plaintiffs had deposited the \$1,000, earnest money, in escrow with him he had converted the same to his own use. Defendant also testified and four witnesses for him, including Charles Biesel, one of the vendors, and E. M. Fawcett, a salesman in defendant's employ. The evidence disclosed that shortly prior to the date of the signing of the contract the parties were brought together through the efforts of Fawcett, defendant's agent; that some time in May an abstract of title, brought down to date, was furnished to plaintiffs and was examined by their attorney; that thereafter many meetings were had between the parties to the contract and their respective representatives for the purpose of bringing about a consummation of the deal; that the Biesels were able and willing to deliver a good title to the premises to plaintiffs in accordance with the contract; that they had placed a first mortgage upon the premises for \$12,000, at a rate of interest not exceeding that specified in the contract, and had executed a warranty deed, ready for delivery, of the premises to plaintiffs, subject to said mortgage; that papers for a second mortgage for \$13,500, including monthly notes, to be signed by plaintiffs in accordance with the contract, had been drafted by one Fred Plotke, who had agreed to loan the money

incurred for the vendor by his agent in this matter, and agreed to the payment to the vendor's broker of a commission of 2% on the selling price herein mentioned for services in procuring this contract, together with the expenses of the vendor.

On the trial both of the plaintiffs testified, as well as three witnesses for them. Their testimony failed to show that prior to or at the time of the signing of the contract, defendant made any false representations, regarding immunities on the premises, or otherwise, which induced plaintiffs to obtain their signature thereto, or that he was guilty of any fraud in the negotiations, or that, after plaintiffs had deposited the \$15,000.00, in money with him he had converted the same to his own use. Defendant also testified and four witnesses for him, including Charles Hise, one of the vendors, and E. W. Hovatt, a witness in defendant's employ. The evidence disclosed that shortly prior to the date of the signing of the contract the parties were brought together through the efforts of Hovatt, defendant's agent; that some time in May an abstract of title, brought down to date, was furnished to plaintiffs and was examined by their attorney; that thereafter many meetings were had between the parties to the contract and their respective representatives for the purpose of bringing about a consummation of the deal; that the Hise's were able and willing to deliver a good title to the premises to plaintiffs in accordance with the contract; that they had placed a first mortgage upon the premises for \$15,000.00, at a rate of interest not exceeding that specified in the contract, and had executed a warranty deed, ready for delivery, of the premises to plaintiffs, subject to said mortgage; that papers for a second mortgage for \$15,000.00, including monthly notes, to be signed by plaintiffs in accordance with the contract, had been drafted by one Fred Hise, who had agreed to loan the money.

on such mortgage; that disputes arose as to the proper amounts of the monthly notes, and certain changes therein were made; that it appeared that there were certain existing chattel mortgages on some of the furniture in the apartment building and other disputes arose as to who would be entitled to the furniture, although there is no mention regarding the same made in the contract; that it was arranged that plaintiffs could become possessed of the furniture free from liens; but that finally in June, 1923, at the last meeting in Plotke's office, August Sandberg, plaintiff, stated the plaintiffs would not consummate the deal, refused to make the additional cash payment of \$5,000, etc., or to execute said second mortgage for \$13,500, or the notes to be secured thereby, and the deal was not consummated. One of defendant's witnesses, who was present at said final meeting testified that August Sandberg then stated in substance that he was afraid, if he purchased the premises, he would lose money, and that he would rather forfeit the \$1,000, so placed in escrow, than go through with the deal.

After reviewing the present transcript we are of the opinion that the jury's verdict, assessing plaintiffs' damages at \$1,000, is contrary to the evidence, and contrary to the provisions of the contract relative to the disposition of the \$1,000 deposited with defendant, in case plaintiffs failed to consummate the contract, and that the judgment should be reversed. Furthermore, the trial court would not allow either the defendant or his agent, Fawcett, to testify what final disposition was made of the \$1,000. The following occurred in the presence of the jury while Fawcett was testifying as a witness for defendant:

"Q. What was done with the \$1,000, if you know?

MR. CALLAHAN: I object to that as immaterial.

THE COURT: I think they ought to account for the \$1,000 under the contract.

on such mortgage; that although there is no direct evidence of the actual notes, and certain mortgage records were made; that it appeared that there were certain existing chattel mortgages on some of the furniture in the apartment building and other disposes there as to who would be entitled to the furniture, although there is no actual testimony as to who was in the apartment; that it was suggested that plaintiff could obtain possession of the furniture from them; but that finally in June, 1937, at the last meeting in Chicago, August Garaberg, plaintiff, stated the plaintiff would not consummate the deal, refused to make the additional cash payment of \$5,000, etc., or to execute said second mortgage for \$15,000, or the notes to be secured thereby, and the deal was not consummated. One of defendant's witnesses, who was present at said final meeting testified that about midway that night in substance that he was afraid, if he purchased the furniture, he would lose money, and that he would rather forfeit the \$1,000, as placed in escrow, than to through with the deal.

After reviewing the present transcript we are of the opinion that the jury's verdict, assessing plaintiff's damages at \$1,000, is contrary to the evidence, and contrary to the provision of the contract relative to the disposition of the \$1,000 deposited with defendant, in case plaintiff failed to consummate the contract, and that the judgment should be reversed. Furthermore, the trial court would not allow the defendant to file a demurrer, to testify that final disposition was made of the \$1,000. The following occurred in the presence of the jury while Yaworski was testifying as a witness for defendant:

Q. That was done with the \$1,000, if you know?
A. CALLAHAN: I object to that as immaterial.
THE COURT: I think they ought to account for the \$1,000 under the contract.

MR. GOLDFINE: We are looking upon this as liquidated damages.

MR. CALLAHAN: We are suing Mr. Cooper. We don't care what he did with it.

THE COURT: The only question here is whether the parties carried out this contract. I sustain the objection."

In view of the allegations in plaintiffs' statement of claim and the facts shown we think that the court erred in the ruling, and that the court's remarks tended to mislead the jury.

Plaintiffs' counsel here contends that the verdict and judgment are warranted because the contract is void for lack of certainty and because it was impossible of performance. No such contention as a ground of recovery is made in the statement of claim and we cannot say, after examining the contract, that it is uncertain or incapable of being performed. And, clearly, the evidence does not show that when plaintiffs' action was commenced defendant had in his possession \$1,000, for the sole use of plaintiffs and which in equity and good conscience should be returned to them.

The judgment of the Municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Wells, J., concur.

Mr. Callahan: We are looking upon this as a libelous
statement.
Mr. Callahan: We are asking Mr. Cogger. We don't care
what he did with it.
The only question here is whether the parties
carried out this contract. I maintain the
"objection."

In view of the allegations in plaintiff's statement of
claim and the facts shown we think that the court erred in the
ruling, and that the court's ruling should be reversed and
plaintiff's account into credits and the verdict and
judgment are warranted because the contract is void for lack of
certainty and because it was impossible of performance. No such
objection as a ground of recovery is made in the statement of
claim and we cannot say, after examining the contract, that it is
uncertain or incapable of being performed. And, clearly, the
evidence does not show that when plaintiff's action was commenced
defendant had in his possession \$1,000, for the sole use of
plaintiff and which in equity and good conscience should be
returned to them.

The judgment of the Municipal Court is reversed and the
cause remanded.
JAMES T. L. and Felix J. Connor.

2451A. 630³

198 - 31809

R. A. J. SCHNEIDER,
Appellee,

v.

FIDELITY CONSTRUCTION COMPANY,
a corporation,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a first class action in assumpsit, commenced in the Municipal court of Chicago on March 24, 1925, there was a trial before a jury resulting in a verdict and judgment against defendant for \$1678.32, and it appealed.

Plaintiff alleged in his amended statement of claim that about January 1, 1924, defendant, by its duly authorized officers, employed him to solicit and estimate steel construction contracts for it at a salary of \$50 per week and that at the time it was further verbally agreed that in addition to said salary he was to receive "50 cents per ton on all such construction contracts secured by him for defendant, and also a corresponding percentage on all metal mesh work and extra labor pertaining to the contracts." In the statement of claim there is set forth a list of the contracts which he claims he secured for defendant, giving the name of the contractor, the location of the job, and itemizing as to each contract the number of pounds of steel, and the square footage of metal mesh used, and the amount in dollars of the extra labor. Plaintiff further alleged that there was "a grand total of 4850.20 tons, which at the agreed commission of 50 cents per ton amounts to \$2,425.10," and which sum defendant, although often requested, has refused to pay, etc. In its affidavit of merits

U. S. DEPARTMENT OF JUSTICE
DIVISION OF INVESTIGATION
WASHINGTON, D. C.
JANUARY 1, 1935
MEMORANDUM FOR THE ATTORNEY GENERAL
SUBJECT: [REDACTED]
RE: [REDACTED]

RE: [REDACTED] THE DIVISION OF THE COURT.

In a first class action in [REDACTED], commenced in
the Municipal Court of Chicago on March 24, 1933, there was a
trial before a jury resulting in a verdict and judgment against
defendant for \$1875.52, and it appeared.
Plaintiff alleged in his amended statement of claim
that about January 1, 1934, defendant, by its duly authorized
officers, employed him as solicitor and estimate steel construction
contracts for it at a salary of \$80 per week and that at the time
it was further verbally agreed that in addition to said salary he
was to receive "50 cents per ton on all such construction con-
tracts secured by him for defendant, and also a corresponding
percentage on all metal work and extra labor pertaining to
the contracts." In the statement of claim there is set forth a
list of the contracts which he claims he secured for defendant,
giving the name of the contractor, the location of the job, and
itemizing as to each contract the amount of steel, and the square
footage of metal work used, and the amount in dollars of the extra
labor. Plaintiff further alleged that there was a grand total of
1815.50 tons, which at the agreed commission of 50 cents per ton
amounts to \$907.50, and which was defendant, although often
requested, has refused to pay, etc. In the affidavits of merits

defendant denied that it ever made any agreement with plaintiff to pay him for his services anything in addition to his salary, or that it is indebted to him in any amount.

On the trial, had in October, 1926, plaintiff was the only witness in support of his claim. His testimony was to the effect that about January 1, 1924, he went to defendant's office seeking employment and there met W. H. Paget and Edward Cobay, then respectively the manager and superintendent of defendant; that as a result of the interview he was employed to work for defendant, his duties to be the estimating of all steel construction contracts to be secured by defendant, the soliciting and securing from general contractors sub-contracts for such construction work, and the doing of certain office work; that it was verbally agreed at the time that he was to receive a salary of \$50 per week and also a commission of 50 cents per ton on all steel used in the buildings erected under such construction contracts as were obtained for defendant through his efforts as a solicitor; that at the time it was not stated specifically that such commission was to be allowed on the metal mesh work or on extra labor, but that such was the custom in the trade and it was so understood; and that on the following day he entered upon his duties, performed them regularly until his discharge, and succeeded through his efforts in obtaining for defendant a large number of such contracts which were afterwards completed by it. He presented a list of the contracts claimed to have been estimated/and secured by him, substantially like the list as set forth in his statement of claim, and the same was allowed in evidence over objection. He testified at considerable length concerning these contracts, and further testified in substance that during March, 1924, he had another interview with Paget at which time he requested the making of a written contract between defendant and himself as to his commissions, that Paget then said that such contract would

defendant denied that it ever made any agreement with plaintiff to pay him for his services anything in addition to his salary, or that it is indebted to him in any amount.

On the trial, held in October, 1933, plaintiff was the only witness in support of his claim. His testimony was to the effect that about January 1, 1934, he went to defendant's office seeking employment and there met . . . H. Paget and Edward Gage, then respectively the manager and superintendent of defendant; that as a result of the interview he was employed to work for defendant, his duties to be the estimating of all steel construction contracts to be secured by defendant, the collecting and recording from general contractors who contract for such construction work, and the doing of certain office work; that it was verbally agreed at the time that he was to receive a salary of \$25 per week and also a commission of 50 cents per ton on all steel used in the buildings erected under such construction contracts as were obtained for defendant through his efforts as a solicitor; that at the time it was not stated specifically that such commission was to be allowed on the metal work or on extra labor, but that such was the custom in the trade and it was so understood; and that on the following day he entered upon his duties, performed them regularly until his discharge, and succeeded through his efforts in obtaining for defendant a large number of such contracts which were afterwards completed by it. He presented a list of the contracts claimed to have been obtained by him, substantially like the list as set forth in his statement of claim, and the same was allowed in evidence over objection. He testified at considerable length concerning these contracts, and further testified in substance that during March, 1934, he had another interview with Paget at which time he requested the making of a written contract between defendant and himself as to his commission, that Paget then said that such contract would

be drafted and submitted to plaintiff for his signature but that this was never done; that during April, 1924, his salary was increased to \$65 per week, but that at the interview then had nothing was said as to any claim of his for commission due or to become due; that thereafter and until about December 1, 1924, when he was discharged, he received each week the salary as so increased; that about May 1, 1924, the Drollinger brothers - Ben H. and George L. - purchased a large interest in the defendant company and thereafter were officers and in control thereof; that early in that month they called a meeting to ascertain the condition of the business, etc., at which they, Faget, Cobey, plaintiff and others were present, and that nothing then was said as to plaintiff's claim for commissions due or to become due, although two or three of the contracts, on which he based a portion of his claim, had then been completed; that he never informed either of the Drollingers of his said claim until George L. discharged him in December, 1924, and handed him a check for the week's salary then due; that in October, 1924, after the Drollingers had assumed control of the business, but while Faget was still the manager of the defendant and the directing head of its office affairs and all outside work, he showed Faget a memorandum, drafted by himself, disclosing approximately the amount of commissions he claimed, that Faget looked at it and said that "he thought it was allright," but that he (plaintiff) "did not then ask him anything about the payment of commissions." This memorandum was allowed in evidence over objection.

After plaintiff had rested his case in chief, defendant called Edward Cobey as a witness. He testified that the defendant company started in business in November, 1923; that at the beginning he was appointed superintendent of all its construction work and is still acting as such; that in January, 1924, Faget was an

be drafted and admitted to plaintiff for his signature but this
 this was never done; that during April, 1934, his salary was in-
 creased to \$65 per week, but that at the interview then had nothing
 was said as to any claim of his for commission due or to become due;
 that thereafter and until about December 1, 1934, when he was dis-
 charged, he received each week the salary as so increased; that
 about May 1, 1934, the Wallingford brothers - Ben H. and George H.
 - purchased a large interest in the defendant company and there-
 after were officers and in control thereof; that early in that
 month they called a meeting to ascertain the condition of the
 business, etc., at which they, Wages, plaintiff and others
 were present, and that nothing then was said as to plaintiff's
 claim for commissions due or to become due, although two or three
 of the directors, one of which he named a portion of his claim, had
 then been contacted; that he never informed either of the Wallingford
 of his claim until George H. discharged him in December, 1934,
 and handed him a check for the week's salary then due; that in October,
 1935, after the Wallingford had assumed control of the business,
 but while Wages was still the manager of the defendant and the
 directing head of its office affairs and all outside work, he
 showed Wages a memorandum, drafted by himself, discussing approx-
 imately the amount of commissions he claimed, that Wages looked at
 it and said that "he thought it was all right," but that he
 (plaintiff) did not then say anything about the payment of
 commissions. This memorandum was allowed in evidence over objection.
 After plaintiff had tested his case in chief, defendant
 called Edward Coby as a witness. He testified that the defendant
 company started in business in November, 1933; that at the beginning
 he was appointed superintendent of all the construction work and
 is still acting as such; that in January, 1934, Wages was an

officer and general manager of the company and that he then and thereafter solicited and estimated on construction contracts for it; and that he was present in the company's office on an evening in January, 1924, at an interview there had between plaintiff, Faget and himself and which resulted in plaintiff becoming an employee of the company and thereafter doing estimating work on prospective construction contracts and soliciting such contracts. He further testified that at the interview plaintiff was asked where he had worked and what he had done, etc., and that he answered the questions, giving the names of several companies; that Faget then asked him what salary he wanted and he replied that "he would have to have a pretty good one to keep going;" that Faget then said that "our company is just starting out and we cannot afford to pay a high wage, so the best we could do would be \$50 per week;" that plaintiff said that he would work for that sum; and that that was all that was said about his hiring. Cobey further testified that just after the Drollingers had secured control of the company, he attended a meeting early in May, 1924, at which the Drollingers, plaintiff, Faget, and others were present; that the Drollingers then asked several employees, including himself, what their particular duties were and what salaries they were receiving; that these questions, being answered, were in turn put to plaintiff and that he replied that he was an estimator on contracts and was receiving a salary of \$65 per week; that plaintiff did not then state that he was working on any commission basis in addition to his salary; that thereafter he (the witness) had frequent and friendly business relations with plaintiff, and that the latter never mentioned to him that he had any such commission arrangement. Both of the Drollingers testified to the effect that at said meeting plaintiff was asked if he was willing to continue to work for the company at a salary of \$65 a week,

officer and general manager of the company and that in 1934 and
thereafter solicited and obtained on commission contracts for
it; and that he was present in the company's office on an evening
in January, 1934, at an interview there had between plaintiff
Tegat and himself and which resulted in plaintiff becoming an
employee of the company and thereafter being continuing with an
prospective commission contracts and soliciting such contracts.
He further testified that at the interview plaintiff was asked where
he had worked and what he had done, etc., and that he answered the
questions, giving the names of several companies; that Tegat then
asked him what salary he wanted and he replied that "he would have
to have a pretty good one to keep going"; that Tegat then said that
"your company is just starting out and we cannot afford to pay a high
salary, so the best we could do would be \$50 per week"; that plaintiff
said that he would work for that and that that was all that was
said about his hiring. Tegat further testified that just after the
plaintiff had received control of the company, he attended a meeting
early in May, 1934, at which the defendants, plaintiff, Tegat, and
others were present; that the defendants then asked several employ-
ees, including himself, what their particular duties were and what
salaries they were receiving; that these questions, being answered,
were in turn put to plaintiff and that he replied that he was an
estimator on contracts and was receiving a salary of \$50 per week;
that plaintiff did not then state that he was working on any commission
basis in addition to his salary; that thereafter he (the witness)
had frequent and friendly business relations with plaintiff, and
that the latter never mentioned to him that he had any such
commission arrangement. Each of the defendants testified to the
effect that at said meeting plaintiff was asked if he was willing
to continue to work for the company at a salary of \$50 a week.

and that he replied that he was, and that he did not at that meeting, or at any subsequent time until after his discharge in December, 1924, state to them that he had any claim against the company for any commissions due or to become due.

It appears that defendant's manager, Paget, severed his connection with the company during October, 1924, and that he had been subpoenaed to testify as a witness for plaintiff on the trial, but that, after interviewing him in the court room, plaintiff's attorney decided not to call him, and thereupon it was agreed that he would be called as the court's witness. After Cobey had testified he (Paget) took the stand and was examined at great length by the court, supplemented by cross-examination by the attorneys for the respective parties. His testimony was to the effect that in January, 1924, he hired plaintiff to work for defendant company as an estimator and solicitor of construction contracts at a salary of \$50 per week, and that at the meeting which resulted in plaintiff accepting employment in the company absolutely nothing was said as to paying plaintiff any commission in addition to said salary; that there was some talk about later increasing the amount of the salary, in case defendant's increased business warranted it and plaintiff's work proved satisfactory, but that no definite promises were made; that from that time until he ceased acting as manager of defendant, he had general charge of the estimating on and the soliciting of all construction contracts and that plaintiff assisted him in this work; and that many of the contracts which plaintiff claims he secured for defendant were in fact secured through his (Paget's) efforts. On being shown plaintiff's list of contracts, introduced in evidence, he checked them over and stated that seven or eight of them were obtained through his individual efforts rather than plaintiff's. He further testified that he had no recollection of being shown,

and that he replied that he was, and that he did not at that meeting, or at any subsequent time until after his discharge in December, 1934, state to them that he had any claim against the company for any commissions due or to become due.

It appears that defendant's manager, Robert, advised his connection with the company during October, 1934, and that he had been subpoenaed to testify as a witness for plaintiff on the trial, but that, after interviewing him in the court room, plaintiff's attorney decided not to call him, and thereafter it was agreed that he would be called as the court's witness. After Casey had testified he (Robert) took the stand and was examined at great length by the court, supplemented by cross-examination by the attorney for the respective parties. His testimony was to the effect that in January, 1934, he hired plaintiff to work for defendant company as an estimator and collector of construction contracts at a salary of \$50 per week, and that at the meeting which resulted in plaintiff's accepting employment in the company absolutely nothing was said as to paying plaintiff any commission in addition to said salary; that there was some talk about later increasing the amount of the salary in case defendant's increased business warranted it and plaintiff's work proved satisfactory, but that no definite promises were made; that from that time until he ceased acting as manager of defendant he had general charge of the estimating on and the collecting of all construction contracts and that plaintiff assisted him in this work and that many of the contracts which plaintiff claims he secured for defendant were in fact secured through his (Robert's) efforts. On being shown plaintiff's list of contracts, introduced in evidence, he checked them over and stated that seven or eight of them were obtained through his individual efforts rather than plaintiff's. He further testified that he had no recollection of being shown,

in October, 1924, or at any other time, plaintiff's memoranda of commissions claimed (introduced in evidence), or having any conversation concerning it with plaintiff, and that the first time he ever saw the memoranda was when shown to him in the trial court. Just before the case was submitted to the jury it was stated to them, by consent of counsel, that plaintiff claimed commissions in the total amount of \$2425.10 on all the contracts enumerated in his statement of claim, and that, if these contracts claimed to have been secured by Faget were eliminated, it would deduct \$1493.58 from the amount plaintiff claimed, leaving \$931.52, but that it was to be understood by the jury that plaintiff did not admit that such deduction should be made and that defendant did not admit that plaintiff was entitled to recover any amount as commissions.

After carefully reviewing the present abstract of the testimony we have reached the conclusion that the verdict and judgment are manifestly contrary to the weight of the evidence, and that there should be another trial of the cause. The plaintiff did not show by a preponderance of the evidence that defendant, at the time plaintiff was hired as its employee to do said estimating and soliciting work or at any subsequent time, agreed to pay him commissions, as claimed, in addition to his weekly salary, which was regularly paid to him until his discharge. Furthermore, we are of the opinion that the presiding judge, in his remarks made from time to time during the trial and in his examination and cross-examination of some of the witnesses, evinced such a bias in favor of plaintiff's side of the case as was calculated to influence the jury in his favor, and constituted error prejudicial to defendant. (38 Cyc. pp. 1316, 1321; Dunn v. People, 172 Ill. 582, 595; People v. Pelletti, 323 Id. 176, 181.)

The judgment of the Municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Wells, J., concur.

in October, 1934, or at any other time, Plaintiff's memorandum of
commission claimed (introduced in evidence), or having any con-
nection concerning it with Plaintiff, and that the first time
he ever saw the memoranda was when shown to him in the trial court.
Just before the case was submitted to the jury it was stated to them,
by consent of counsel, that Plaintiff claimed commission in the
total amount of \$2485.10 on all the contracts enumerated in his
statement of claim, and that, if those contracts claimed to have been
secured by notes were eliminated, it would deduct \$1485.25 from the
amount Plaintiff claimed, leaving \$999.85, but that it was to be
understood by the jury that Plaintiff did not admit that such deduction
should be made and that defendant did not admit that Plaintiff was
entitled to recover any amount as commission.
After carefully reviewing the present statement of the facts
many we have reached the conclusion that the verdict and judgment are
manifestly contrary to the weight of the evidence, and that there should
be another trial of the cause. The Plaintiff did not show by a pre-
ponderance of the evidence that defendant, at the time Plaintiff was
hired as its employee to do work collecting and collecting work on its
any subsequent time, agreed to pay him commission, as claimed, in
addition to his weekly salary, which was regularly paid to him until
his discharge. Furthermore, we are of the opinion that the preceding
facts, in his former work from time to time during the trial and in
his examination and cross-examination of some of the witnesses, showed
such a bias in favor of Plaintiff's side of the case as was calculated
to influence the jury in his favor, and constituted error prejudicial
to defendant. (38 Cal. 2d 1316, 1321; 1321 v. People, 175 Cal. 522,
523; People v. Plaintiff, 225 Cal. 176, 181.)
The judgment of the Municipal Court is reversed and the
cause remanded.
REVEREND AND HONORABLE
JAMES, P. J., and Vello, J., concur.

ALICE BANTA,
Appellee,

v.

MRS. PAUL MATTSON,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On October 20, 1926, in the Municipal court of Chicago, two actions in detinue were commenced against Mrs. Augusta Mattson (sued as Mrs. Paul Mattson) - one by Alice Banta and the other by Enos Kaschassy. Each was given leave to sue as a poor person. The actions were tried before the court without a jury on November 18, 1926, resulting in a finding in the Banta case that defendant was "guilty of unlawfully detaining from plaintiff the property of plaintiff, which is described in the statement of claim and is of the value of \$146." A similar finding was entered in the Kaschassy case, except as to the value of the property, which was found to be \$445. Separate judgments were entered against defendant. In the judgment in favor of Mrs. Banta, the court ordered that "final judgment be entered on the finding herein, and that plaintiff have and recover of and from defendant the possession of the property described in said finding." of the value as set forth therein; that execution issue for the "restoration of said property;" and that the execution to be issued "shall provide that, if said property shall not be found, there shall, at the option of plaintiff, be made thereon the value of the property as aforesaid," together with costs of suit. The judgment as entered in the Kaschassy case is in the same language. Defendant perfected separate appeals to this appellate court (Nos. 31819 and 31820) and there-

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ALICE BERRY, Appellant,	}	ALICE BERRY, Appellee.
v.		ALICE BERRY, Appellee.

THE JUDICIAL BRANCH OF THE COURT.

ON October 20, 1934, in the Municipal Court of Chicago, two actions in detinue were commenced against Mrs. Margaret Hanson (now Mrs. Paul Hanson) -- one by Alice Berry and the other by Mrs. Hanson. Mrs. Hanson was given leave to sue as a party defendant. The actions were tried before the court without a jury on November 12, 1934, resulting in a finding in the Berry case that defendant was "guilty of unlawfully detaining from plaintiff the property of plaintiff," and as provided in the statement of claim and in the value of \$100. A similar finding was entered in the Hanson case, except as to the value of the property, which was found to be \$100. Separate judgments were entered against defendant in the judgment in favor of Mrs. Hanson, the court ordered that "final judgment be entered on the finding herein, and that plaintiff have and recover of and from defendant the possession of the property described in said finding," of the value as set forth therein; and execution issue for the "restitution of said property," and that the execution be issued "shall provide that, if said property shall not be found, there shall, at the option of plaintiff, be made between the value of the property as determined, together with costs of suit. The judgment as entered in the Hanson case is in the same language. Defendant petitioned separately to this appellate court (Nos. 21219 and 21220) and there-

after they were ordered consolidated for hearing. One set of abstracts and briefs has been filed by appellant. Neither appellee has entered an appearance in this court or filed a brief.

In Mrs. Banta's statement of claim she alleges that she is the owner and entitled to the possession of "the following goods and chattels, the same, together with the value of each separate article, being as follows." After itemizing the articles and giving separate values to each (aggregating \$156), she further alleges that on May 4, 1926, defendant became possessed of the goods "by barring and locking plaintiff out of the rooms rented by Enos Kaschassy, and in which rooms she was engaged as housekeeper for Kaschassy;" and that defendant now unlawfully detains the goods from plaintiff, wherefore she claims the property "in detinue and \$156 damages for detention thereof." In said itemization are mentioned: 5 dresses, 2 coats, 1 trunk, 1 kodak, (value of each given) and "numerous articles of underwear and stockings," valued at \$25.

In Kaschassy's statement of claim similar allegations are made. The various articles and the value of each are mentioned, being 1 trunk, sundry articles of men's wearing apparel, 1 set of barber's tools, sundry carpenter's tools, etc. The aggregate value is stated to be \$445.70, and it is alleged that, on May 4, 1926, defendant became possessed of the goods by "barring and locking plaintiff out of his rooms in the rooming house operated by defendant." He claims the property "in detinue, and \$200 damages for detention thereof."

From a so-called "statement of facts," certified by the trial judge and contained in the transcript in the Banta case, it appears that the only evidence received was the testimony of plaintiff and defendant. Mrs. Banta testified that she and Kaschassy occupied a "kitchenette and living room" in the

after they were ordered consolidated for hearing. One set of exhibits and articles has been filed by applicant. Neither applicant has entered an appearance in this court or filed a reply.

In Mrs. Banta's statement of claim she alleges that she is the owner and entitled to the possession of "the following goods and chattels, to-wit: the same, together with the value of each separate article, being as follows." After itemizing the articles and giving separate values to each (aggregating \$136), she further alleges that on May 4, 1936, defendant became possessed of the goods "by having and taking plaintiff out of the room rented by Isaac Kachinsky, and in which room she was engaged as housekeeper for Kachinsky;" and that defendant now unlawfully detains the goods from plaintiff, wherefore she claims the property "in damages and \$100 damages for detention thereof." In said itemization are mentioned: 3 dresses, 2 coats, 1 trunk, 1 watch, (value of each given) and "numerous articles of furniture and accessories," valued at \$12.

In Kachinsky's statement of claim similar allegations are made. The various articles and the value of each are mentioned, being 1 trunk, sundry articles of men's wearing apparel, 1 set of barber's tools, sundry carpenter's tools, etc. The aggregate value is stated to be \$248.70, and it is alleged that, on May 4, 1936, defendant became possessed of the goods by "having and taking plaintiff out of his room in the rooming house operated by defendant." He claims the property "in damages, and \$200 damages for detention thereof."

From a so-called "statement of facts," certified by the trial judge and contained in the transcript in the Banta case, it appears that the only evidence received was the testimony of plaintiff and defendant. Mrs. Banta testified that she and Kachinsky occupied a "kitchenette and living room" in the

premises at Nos. 5 and 7 West Delaware Place, Chicago, from September 21, 1925, until about May 4, 1926; that all the goods mentioned in her statement of claim "were from 2 to 3 years old;" and that the value thereof, as stated in her statement of claim, was the price or prices "paid at the time or times of purchase." She made no attempt to show what was their value on May 4, 1926.

Defendant's testimony was to the effect that she was the owner of the leasehold estate of the premises and building at Nos. 5 and 7 West Delaware Place (as well as all of the equipment), which she operated as a hotel, known as the "Delaware Hotel;" that there were 44 rooms, of which 38 were sleeping rooms and the remaining ones were arranged for "light housekeeping;" that from time to time she rented out all of the rooms either by the day or week, and furnished all guests with heat, light, linens, maid service, and such other accommodations as usually are furnished by hotel keepers; that during September, 1925, plaintiff and Kaschassy, saying they were husband and wife, applied to her to rent them two rooms in the hotel; that she agreed, for the price of \$8.50 per week, to rent them two rooms - one a living room and the other a smaller one, but having conveniences for cooking and serving light meals; that they agreed to pay the rent, immediately moved in, and continuously occupied the rooms until about May 4, 1926; that for the first few weeks one or the other promptly paid the rent, but thereafter they fell behind; that on May 4, 1926, they owed her over \$200 (they having previously paid the total sum of \$75) and she took possession of certain of their chattels and effects, as security for the amount owing, told them to vacate, and barred them from the rooms; and that then she learned for the first time that they were not husband and wife.

According to the statement of facts in the Kaschassy case, he was the only witness testifying in his behalf. Defendant

premises at Nos. 5 and 7 West Delaware Street, Chicago, from September 21, 1935, until about May 4, 1936; that all the goods mentioned in her statement of claim "were from 2 to 3 years old;" and that the value thereof, as stated in her statement of claim, was the price or value "paid at the time of purchase." She made no attempt to show what was their value on May 4, 1936.

Belmont's testimony was to the effect that she was the owner of the household effects of the premises and building at Nos. 5 and 7 West Delaware Street (as well as all of the equipment), which she occupied as a hotel, known as the "Belmont Hotel," that there were 42 rooms, of which 35 were sleeping rooms and the remaining ones were arranged for "light housekeeping;" that from time to time she rented out all of the rooms either by the day or week, and furnished all guests with food, light, linen, and towels, and such other accommodations as usually are furnished by hotelkeepers; that during September, 1935, principally and exclusively, when they were occupied and with, applied to her to rent from two rooms in the hotel; that she agreed, for the price of \$8.50 per week, to rent them two rooms - one a living room and the other a smaller one, but having conveniences for cooking and a heating light heater; that they agreed to pay the rent. Immediately moved in, and continuously occupied the rooms until about May 4, 1936; that for the first two years one of the other parties paid the rent, but thereafter they both paid; that on May 4, 1936, they owed her over \$100 (they having previously paid the total sum of \$75) and she took possession of certain of their effects and others, as security for the amount owing. She does not recall, and does not know from the records, and that from the records for the time that they were not occupied and with.

According to the statement of facts in the indictment, she was the only witness testifying in her behalf. Belmont

testified, as did her divorced husband, Paul Mattson, for her. Kaschassy's testimony was to the effect that he was a former employee of Paul Mattson; that one day in September, 1925, he and Mrs. Banta, looking for rooming accommodations, met Mattson on the street, and it was arranged that he and Mrs. Banta might occupy two rooms in the hotel and that he (Kaschassy) might from time to time pay something "towards defraying the expenses of the place;" that on the same day he and Mrs. Banta moved into and occupied the rooms until May 4, 1926, when upon returning they found their access thereto barred; that he never agreed with defendant to pay to her \$8.50 a week for the rooms, although he admitted that from time to time he had given her in small payments the total sum of \$75. He further testified that he was the owner of the articles enumerated in his statement of claim, which were of the separate value as stated therein; that the articles were "from 2 to 15 years old;" and that the values were the respective prices paid "at the time or times of purchase." Mattson denied that he had made any such agreement or arrangement as Kaschassy testified, and stated that he then was divorced from defendant and had no interest in the hotel, etc. The defendant, Mrs. Augusta Mattson, testified to the same effect as in the Banta case.

While the action of detinue is a somewhat unusual one (Felt v. Williams, 1 Scam. 206, 207), it is available in this State (Robinson v. Peterson, 40 Ill. App. 132, 134.) It lies "for the recovery, in specie, of personal chattels from one who acquired possession of them lawfully but retains it without right, together with damages for the detention." (1 Bouv. Law Dict., Hawle's 3rd Ed. p. 858.) "The judgment is to recover the identical thing itself, or the value, if it is not restored." (Felt v. Williams, supra; 1 Bouv. Law Dict. p. 859.) After reviewing the evidence we do not

testified, as did her divorced husband, Paul Watson, the father.

Watson's testimony was to the effect that he was a former

employee of Paul Watson; that one day in September, 1938, he and

Paul Watson, leaving for rooming accommodations, met Watson on the

street, and it was arranged that he and Mrs. Watson might occupy

two rooms in the hotel and that he (Watson) might leave them to

find pay something "downward" relative to the expense of the place,

that on the same day he and Mrs. Watson moved into and occupied the

rooms until May 8, 1938, when upon returning they found their access

thereby barred; that he never agreed with Watson to pay to him

10.00 a week for the rooms, although he admitted that from time to time

he had given her in small payments the total sum of \$75. He further

testified that he was the owner of the premises concerned in this

statement of claim, which were at the separate values as stated

therein; that the articles were "from 5 to 10 years old," and that

the value was the respective prices paid "as the time it took to

purchase." Watson denied that he had made any such statement or

arrangement as Watson testified, and stated that he then was

divorced from Watson and had no interest in the hotel, 508. The

testimony of Mrs. Watson, testified to the same effect as in

the first case.

While the action of setting up a business account was

(Paul v. Watson, I term, 1938, 1939) is to establish in this case

Watson v. Watson, as the law, 1938, 1939) it is "for the

purpose, in specie, of personal chattels from one to another

possession of them lastly and before it is not right, because

and changes for the action." (I term, 1938, 1939) Watson's and

the testimony is to recover the amount of the claim itself.

on the value, it is as stated." (Paul v. Watson, 1938)

2 Nov. 1938, 1939. The testimony of the witness as to the

think that the finding and judgment in either of the two cases can stand, because they are against the manifest weight of the evidence. It sufficiently appears that each of the plaintiffs owed the defendant, as rent for the rooms, a considerable sum of money, long overdue. For this sum she, as the keeper of the hotel, had a lien on the chattels and was entitled to take possession thereof as security for the payment of the indebtedness (Sec. 2, Innkeeper's Act; Section 41 Liens' Act; Cahill's Stat. 1927, pp. 1412 and 1600.) In Blake v. DeJonghe Hotel & Restaurant Co., 174 Ill. App. 129, 132, it is decided that where a person is given a weekly rate, but for no definite period, at a hotel, such arrangement of itself does not change the person's status from a transient or guest to a mere lodger. (See also Hardcastle v. Chicago Hotel & Oyster House, 175 Ill. App. 430; Gross v. Saratoga European Hotel & Restaurant Co., 176 id. 160.) Furthermore, there was no evidence as to what was the separate value of the various chattels on the day that defendant took possession of them. There was evidence tending to show what they originally had cost plaintiff at the time or times of their purchase, several years before. In the action of trover it is well settled that the proper measure of damages "is the market value of the property at the time of the conversion, with interest from that time until the trial." (Sturges v. Keith, 57 Ill. 481, 463; Rund v. Bostrom, 227 Ill. App. 186, 189.) In Head v. Becklenberg, 116 Ill. App. 576, 580, it is said: "But clothing and household goods which have been worn and used cannot in all cases be said to have a market price and will not sell as second hand goods for what they are really worth to the owner, and in such case, in order to give the owner compensation for damage sustained, he must be permitted to recover the actual value of such articles." In the present cases there was no

think that the finding and judgment in favor of the two cases can stand, because they are against the manifest weight of the evidence. It is entirely apparent that each of the plaintiffs used the defendant's car for the same, a considerable sum of money, long overdue. For this sum and, as the result of the hotel, had a lien on the contents and was entitled to some possession thereof as security for the payment of the indebtedness (See, e. g., Imberger v. Aoki; Imberger v. Aoki; Imberger v. Aoki, 1917, 1918 and 1919.) In Imberger v. Imberger Hotel & Restaurant Co., 174 Ill. App. 120, 121, it is decided that where a person is given a weekly rate, but for no definite period, at a hotel, such arrangement of itself does not create the person's status from a transient or guest to a more permanent. (See also Imberger v. Imberger Hotel & Restaurant Co., 175 Ill. App. 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.)

evidence as to what was the actual value of the chattels on May 4, 1926. The portion of the judgment, relating to ^{the} character and extent of the execution to be issued, provides that "if the property shall not be found, there shall, at the option of plaintiff, be made thereon the value of the property as aforesaid," - to-wit, not their present actual value, but what they had cost new, when purchased several years before. Even if plaintiff were entitled to a judgment for the possession of some of the chattels mentioned in the statement of claim, such portion of the judgment appealed from is, under the evidence, improper.

The judgment of the Municipal court in favor of Alice Banta and against defendant is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, F. J., and Wells, J., concur.

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KNOX KASCHASSY,
Appellee,

v.

MRS. PAUL MATTSOHN,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On November 18, 1926, in an action of detinue, plaintiff recovered a judgment in the Municipal court of Chicago against defendant for the possession of certain chattels, etc., and defendant appealed. The facts of the case are very similar to the case of Banta v. Mattson, No. 31819, in which an opinion has this day been filed. For the reasons stated in that opinion the judgment in favor of plaintiff, Kaschassy, and against defendant, is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Wells, J., concur.

000 1748

THE COURT OF APPEALS IN THE SECOND DISTRICT OF CALIFORNIA

IN RE THE ESTATE OF JAMES H. HARRIS, DECEASED

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE COUNTY OF LOS ANGELES

FILED FOR RECORD IN THE OFFICE OF THE CLERK OF THE COURT OF APPEALS

THIS 10TH DAY OF MARCH, 1910

AT LOS ANGELES, CALIFORNIA

WITNESSED MY HAND AND SEAL OF OFFICE

THIS 10TH DAY OF MARCH, 1910

JOHN W. HARRIS, CLERK OF THE COURT

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE COUNTY OF LOS ANGELES

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APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE COUNTY OF LOS ANGELES

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE COUNTY OF LOS ANGELES

217 - 31828

J. C. JACKSON,
Appellee,

v.

JOSEPH CARA,
Appellant.APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment for \$562.09, rendered against him on October 1, 1926, in a 4th class action in contract tried before the court without a jury.

Plaintiff's claim was for a balance allaged to be due upon a written contract, dated February 26, 1925, wherein he agreed, for the price of \$700, to do certain carpentry and other work on defendant's building and premises located at No. 113 Germania Place, Chicago, and also for certain extra labor and materials there furnished at defendant's request amounting to \$263.49. The written contract was set out in full in plaintiff's amended statement of claim, filed April 20, 1926, wherein, in addition to the carpentry work specified, he agreed to "put in cement walk from the street sidewalk running up to the building" and also a "tile stepway under the new door which space will be about 2 feet wide and 6 feet long." Plaintiff alleged that all of the work and materials mentioned in the contract was done and furnished, in a workmanlike manner and with A-No.1 materials as specified, except said concrete and tile work, which by a subsequent verbal agreement defendant arranged to have done by a third party; that defendant had paid him \$300, leaving a balance due on the contract of \$400, less a proper allowance for said concrete and tile work not done by him; that defendant had not paid him anything

ATTEST: JOHN HENRIKSON, CLERK
OF CHICAGO.

J. S. JACKSON,
Appellant,
v.
JOHN W. CARR,
Appellee.

MR. JUSTICE GRIZZY delivered the opinion of the court.

This is an appeal by defendant from a judgment for \$125.00, rendered against him on October 1, 1926, in a civil case action in contract tried before the court without a jury. Plaintiff's claim was for a balance alleged to be due upon a written contract, dated February 26, 1925, wherein he agreed, for the price of \$700, to do certain carpentry and other work on defendant's building and premises located at No. 115 Germania Place, Chicago, and also for certain extra labor and materials there furnished as defendant's account amounting to \$200.00. The written contract was set out in full in plaintiff's amended statement of claim, filed April 20, 1926, wherein, in addition to the carpentry work specified, he agreed to "put in cement walk from the street sidewalk running up to the building" and also a "cile stepway under the new door which space will be about 2 feet wide and 8 feet long." Plaintiff alleged that all of the work and materials mentioned in the contract was done and furnished, in a workmanlike manner and with A-No. 1 materials as specified, except said concrete and cile work, which by a subsequent verbal agreement defendant agreed to have done by a third party. That defendant had paid him \$500, leaving a balance due on the contract of \$200, less a proper allowance for said concrete and cile work not done by him; that defendant had not paid him anything

on account of the extra work; and that there was due to him the total sum of \$673, including a small charge for interest on the unpaid balance on the written contract. The character and the amount of the extra work and materials furnished were fully itemized.

In defendant's affidavit of merits he did not deny the execution of the contract or that the work specified therein (except said concrete and tile work) had not been done by plaintiff. His defenses were: (1) That "some of the work and material furnished was not A. No. 1 material and was not put in in a workmanlike manner;" (2) that plaintiff did not perform any extra work and that the items charged as extras were such as he was required to furnish under the contract; and (3) that defendant was not indebted to plaintiff in any sum, but on the contrary plaintiff was indebted to him in the sum of \$150 for certain painting work done "on a bungalow at Hinsdale, Illinois." For this claimed counter-indebtedness defendant filed a statement of claim of set-off for \$150 "for painting the outside of the bungalow and also one coat of stain on the woodwork inside."

On the trial plaintiff was a witness in his own behalf and three others (including two of his employees) testified for him. Defendant also testified and he called two other witnesses. Besides the written contract certain bills, time cards and other writings were introduced in evidence. The court found the issues "on plaintiff's statement of claim and defendant's set-off" against defendant, and assessed plaintiff's damages at the sum of \$562.09, and entered judgment thereon. It will be noticed that the finding is about \$110 less than the total amount plaintiff claimed. On the issue whether such work as plaintiff did under the contract had been done in a workmanlike manner, with A-No. 1 materials, etc., we think that the evidence showed that plaintiff had

345 I.A. 680

217 - 2180

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

L. E. JACKSON,
Appellant,
v.
JAMES CARR,
Appellee.

MR. JUSTICE GRIMM DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment for

\$143.00, rendered against him on October 1, 1932, in a case

arising out of a contract for the construction of a

building. Plaintiff's claim was for a balance alleged to be due

upon a written contract, dated February 26, 1932, wherein he

agreed, for the price of \$700, to do certain carpentry and other

work on defendant's building and premises located at No. 115

Germania Place, Chicago, and also for certain extra labor and

materials there furnished at defendant's request amounting to

\$143.00. The written contract was set out in full in plaintiff's

amended statement of claim, filed April 20, 1932, wherein, in

addition to the carpentry work specified, he agreed to "put in

concrete walk from the street sidewalk running up to the building"

and also a "cinder alleyway under the new door which space will be

about 8 feet wide and 4 feet long." Plaintiff alleged that all

of the work and materials mentioned in the contract was done and

furnished, in a workmanlike manner and with A-No. 1 materials as

specified, except said concrete and cinder walk, which by a subsequent

verbal agreement defendant alleged to have been by a later party.

That defendant had paid him \$250, leaving a balance due on the

contract of \$450, less a proper allowance for said concrete and

cinder work done by him; that defendant had not paid him anything

on account of the extra work; and that there was due to him the total sum of \$673, including a small charge for interest on the unpaid balance on the written contract. The character and the amount of the extra work and materials furnished were fully itemized.

In defendant's affidavit of merits he did not deny the execution of the contract or that the work specified therein (except said concrete and tile work) had not been done by plaintiff. His defenses were: (1) That "some of the work and material furnished was not A. No. 1 material and was not put in in a workmanlike manner;" (2) that plaintiff did not perform any extra work and that the items charged as extras were such as he was required to furnish under the contract; and (3) that defendant was not indebted to plaintiff in any sum, but on the contrary plaintiff was indebted to him in the sum of \$150 for certain painting work done "on a bungalow at Hinsdale, Illinois." For this claimed counter-indebtedness defendant filed a statement of claim of set-off for \$150 "for painting the outside of the bungalow and also one coat of stain on the woodwork inside."

On the trial plaintiff was a witness in his own behalf and three others (including two of his employees) testified for him. Defendant also testified and he called two other witnesses. Besides the written contract certain bills, time cards and other writings were introduced in evidence. The court found the issues "on plaintiff's statement of claim and defendant's set-off" against defendant, and assessed plaintiff's damages at the sum of \$562.09, and entered judgment thereon. It will be noticed that the finding is about \$110 less than the total amount plaintiff claimed. On the issue whether such work as plaintiff did under the contract had been done in a workmanlike manner, with A-No. 1 materials, etc., we think that the evidence showed that plaintiff had

on account of the extra work) and that there was due to him the
interest on
total sum of \$875, including a small charge for the unpaid balance
on the written contract. The character and the amount of the
extra work and materials furnished were fully examined.
In defendant's affidavit of merits he did not deny the
execution of the contract or that the work specified therein (except
said concrete and tile work) had not been done by plaintiff. His
defenses were: (1) That "some of the work and material furnished
was not A-No. 1 material and was not put in in a workmanlike
manner;" (2) That plaintiff did not perform any extra work and that
the items charged as extras were such as he was required to furnish
under the contract; and (3) That defendant was not indebted to
plaintiff in any sum, but on the contrary plaintiff was indebted to
him in the sum of \$110 for certain painting work done "on a bungalow
at Hinsdale, Illinois." For this claim counter-indemnity
defendant filed a statement of claim of set-off for \$110 "for paint-
ing the outside of the bungalow and also one coat of stain on the
wood-work inside."
On the trial plaintiff was a witness in his own behalf
and three others (including two of his employees) testified for
him. Defendant also testified and he called two other witnesses.
Besides the written contract certain bills, time cards and other
evidence were introduced in evidence. The court found the issues
on plaintiff's statement of claim and defendant's set-off against
defendant, and assessed plaintiff's damages at the sum of \$222.00,
and entered judgment thereon. It will be noticed that the finding
is about \$110 less than the total amount plaintiff claimed. On
the issue whether such work as plaintiff did under the contract
had been done in a workmanlike manner, with A-No. 1 materials,
etc., we think that the evidence shows that plaintiff had

sufficiently complied with the contract in this regard. It appeared that \$400 remained unpaid on the contract, less whatever sum should properly be allowed for the concrete and tile work, which by arrangement plaintiff did not do. As to what was a proper allowance for said work the testimony was conflicting. Defendant's witnesses put it at \$140 - \$85 for the concrete work and \$55 for the tile work. Plaintiff's testimony was to the effect that a fair price for both concrete and tile work, as provided for in the contract, was \$21. On the issues as to what extra work was done by plaintiff, and whether such work could properly be considered as extra work or was required under the contract, the testimony was also conflicting. As to defendant's work in painting for plaintiff the bungalow, as stated in the claim of set-off, plaintiff's evidence showed that \$50 would be a fair price for the materials used and the labor expended.

The main contention of defendant's counsel in his brief is, that the finding and judgment are excessive. He argues that there is a net indebtedness owing to plaintiff of only \$110. After reviewing the evidence we cannot agree with the contention or the argument. It is apparent to us that the court in reaching the finding of \$568.09, in favor of plaintiff, made substantial allowances in defendant's favor for the concrete and tile work, also on plaintiff's claim for extra work, and also for the work that defendant did in painting the bungalow for plaintiff, and we are not disposed to disturb the finding. And we do not think that there is any merit in defendant's counsel's further contention that much of the so-called extra work that plaintiff did on defendant's building was such as was included under the terms of the contract. Equally without merit are counsel's further contentions that the court committed reversible error in certain rulings on evidence,

definitely complied with the contract in this regard. It appeared that \$400 remained unpaid on the contract. It is, however, not clear whether the \$400 was for the concrete and the work, which by agreement plaintiff did not do. As to what was a proper allowance for extra work the testimony was conflicting. Defendant's witnesses put it at \$150 - \$200 for the concrete work and \$25 for the tile work. Plaintiff's testimony was to the effect that a fair price for both concrete and tile work, as provided for in the contract, was \$25. On this issue as to what extra work was done by plaintiff, and whether such work could properly be considered as extra work or was required under the contract, the testimony was also conflicting. As to defendant's work in painting the plaintiff the bungalow, as stated in the claim of set-off, plaintiff's evidence showed that \$50 would be a fair price for the materials used and the labor expended.

The main contention of defendant's counsel in his brief is, that the finding and judgment are excessive. He argues that there is a not indebtedness owing to plaintiff of only \$110. After reviewing the evidence he cannot agree with the finding on the argument. It is apparent to us that the court in reaching the finding of \$500.00, in favor of plaintiff, made substantial allowance in defendant's favor for the concrete and tile work, also on plaintiff's claim for extra work, and also for the work that defendant did in painting the bungalow for plaintiff, and we are not disposed to disturb the finding. And we do not think that there is any merit in defendant's counsel's further contention that much of the so-called extra work that plaintiff did on defendant's building was such as was included under the terms of the contract. We think that the finding is excessive and we think that the court committed reversible error in certain rulings on evidence.

and in unduly limiting the cross-examination of some of plaintiff's witnesses, testifying as to the claimed extra work. And it is not apparent that the finding includes any allowance to plaintiff for interest.

The judgment of the Municipal court should be affirmed, and it is so ordered.

AFFIRMED.

Barnes, P. J., and Wells, J., concur.

CHARLES S. ROBERTS,
Appellee.

v.

CHARLES JOHNS,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action of assumpsit, tried before a jury, there was a verdict and judgment against defendant for \$997.79, on December 7, 1926, and he appealed.

Plaintiff's declaration, consisting of the common counts, was filed on October 16, 1925. In the affidavit accompanying the same it is stated that plaintiff's demand of \$1231.79 is "for money advanced and liabilities contracted at defendant's request." Complying with a rule entered upon defendant's motion, plaintiff filed a bill of particulars, in which it is stated that "the disbursements, for the repayment of which the suit is brought, are as follows:

Illinois Incorporation Tax,	\$234.
John Clayton Advertising Service,	120.
Advertisers' Illustrating Company,	300.
Printing,	10.50
Pringle & Terwilliger (attorney's bill)	567.29
Total	<u>1231.79</u> ;

and that "the above itemized disbursements were made in and about the incorporation of a projected new corporation, and * * were made for the benefit of and for the account of defendant." At the opening of the trial plaintiff's attorney stated that said item of \$234 for "incorporation tax" was also included in said attorney's bill of \$567.29, and that plaintiff's total claim was only \$997.79.

At the conclusion of all the evidence the court gave to the jury two instructions, - one offered by defendant and the following instruction offered by plaintiff:

"If the jury find from a preponderance of the evidence that the plaintiff is entitled to recover they will assess the plaintiff's damages at the sum of \$997.79."

Among the grounds urged for a reversal of the judgment, defendant's counsel contend that the giving of said instruction, under the conflicting evidence as to defendant's liability as to portions of plaintiff's claim, was prejudicial error, and that a new trial should be had. After reviewing plaintiff's testimony, together with certain writings offered by him and admitted in evidence, and also defendant's testimony, we agree with the contention.

According to plaintiff's testimony, defendant, in the fall of 1922, solicited his assistance in the organization of an Illinois corporation for the manufacture of merchantable iron pipe out of old pipe, under a patent held by defendant, and stated that, if plaintiff after investigation found merit in the patent and would help him in such organization, plaintiff could become a stockholder in the corporation. At this time plaintiff was an officer of the South Shore State Bank, in Chicago, and also president of the Advertisers' Illustrating Company, a corporation engaged in the "commercial illustration" business in Chicago. Defendant asked that plaintiff recommend an attorney, who would attend to the organization of the corporation in Illinois, and also obtain a license to do business in Indiana, where he planned to build the company's manufacturing plant. Plaintiff recommended Pringle & Terwilliger, then attorneys for said bank, and he consulted them at defendant's request, and ascertained that they would do the necessary legal work for a fee of \$250, and that the necessary disbursements would be about \$300

Defendant was informed of this and he told plaintiff to go ahead, "have the work done and I'll reimburse you." Thereafter said attorneys, during March and April, 1923, caused the corporation, named "Johns Helling Mills Company," to be organized in Illinois, and obtained permission for it to do business in Indiana. Thereafter they rendered a bill (addressed to the corporation) to plaintiff, showing total disbursements of \$317.29 and a charge of \$250 for services, - a grand total of \$567.29. Plaintiff paid the attorneys for said disbursements, but did not pay them for their services, although he again promised them to do so. This attorney's bill was introduced in evidence. In addition to their charge for services it showed disbursements as follows: \$236.04 for incorporation fee and recording fee; \$45.75 for stock certificates, secretary's book and seal of the corporation; and \$35.50 for obtaining permit for the corporation to do business in Indiana. Plaintiff further testified in substance that, after the corporation had been organized, he suggested to defendant sales of some of its stock to persons living in an Indiana city, near where the manufacturing plant was proposed to be erected, and that such sales could be advanced by a newspaper advertising campaign; that defendant favored such a campaign and requested him to obtain figures as to the cost thereof and as to its proposed character; that plaintiff consulted one John Clayton and also the Advertisers' Illustrating Company, and obtained proposals from each as to character and cost (\$120 for Clayton's work and \$300 for that of the Illustrating Company) and submitted the same to defendant, who expressed approval, and stated: "Go ahead; have the work done on your credit, and I'll reimburse you;" and that thereafter said advertising work was done, as well as some printing work in connection therewith amounting to \$10.50, which defendant also agreed to pay for.

Plaintiff introduced in evidence certain exhibits, showing in "dummy" form the character and nature of the contemplated advertisements, which he claimed he submitted to defendant at the time he obtained the latter's promise to individually reimburse him for the expense thereof.

While defendant in his testimony practically admitted that during one of his conversations with plaintiff he had promised to reimburse him for payments for the franchise fee or tax in operating the corporation in Illinois and the recording of its charter, he denied that he ever had promised to repay him for any attorney's fees in connection with said organization work or for the claimed expense of any advertising campaign. He testified in substance that, after plaintiff had investigated the patent, plaintiff stated that he would take stock in the proposed corporation and furnish about \$30,000, and that he (plaintiff) would see to it that there would be no expense to defendant for attorney's fees for said organization work; that he (defendant) never agreed with plaintiff to pay him for the expense of the company's stock certificate books, seal, etc. or for the fees and expense in obtaining a license for the company to do business in Indiana, and that the arrangement was that those expenses would be paid by the company after organization; that he never promised to reimburse plaintiff for any expense incurred in any advertising campaign; that he did not know about any such campaign; and that plaintiff never submitted to him, and he never saw, any such proposed plan or material for advertising as had been introduced in evidence.

Under the conflicting evidence, as above, it was for the jury, and not the court, to say whether defendant,

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individually, owed plaintiff anything (and if so how much) in addition to the amount of \$236.04, expended for the State fee in connection with incorporating the company in Illinois and for recording its charter. The court's instruction, complained of, virtually amounted to a directed verdict in plaintiff's favor as to all of the several amounts of his claim, as stated in his bill of particulars (as corrected), and, in view of defendant's testimony, was erroneous. It is unnecessary for us to discuss the other points urged by defendant's counsel as additional grounds for a reversal of the judgment.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Barnes, P. J., and Wells, J., concur.

61362

245 I.A. 631

31961

FRANK H. MESCE,
Appellee.

v.

BENJAMIN KULP and
MADISON & KENZIE STATE
BANK, a corporation,
Appellants.

Appeal from an
Interlocutory Injunctonal
Order of the Circuit Court
of Cook County.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order, entered March 24, 1927, granting an interlocutory injunction upon complainant's verified bill, after demurrers to the bill had been overruled. Defendants were enjoined from entering judgment upon complainant's judgment note for \$80,000, (dated April 12, 1926, due nine months after date, and payable to the order of defendant bank) and from selling 1600 shares of the stock of the Wilson-Jones Loose Leaf Company (hereinafter referred to as the Wilson-Jones Co.), held by the bank as collateral security for the note. Counsel for defendants contends that the allegations of the bill are insufficient to warrant the issuance of the injunction.

In the bill, filed January 11, 1927, complainant alleges in substance that, during the whole period of the events therein-after mentioned, Kulp was "the controlling stock owner and president" of the Wilson-Jones Co., and also "a large stock owner and a director" of defendant bank, and, since January, 1926, has been "the chairman of the board of directors of said bank and in control of said bank;" that for the period from January, 1921, until January, 1926, he was the close and confidential business adviser of complainant, and

24714-431

Appeal from an	THOMAS M. BROWN,
Informational	Appellee.
Order of the District Court	
of Cook County.	
	v.
	ROBERT W. BROWN and
	WILLIAM A. BROWN
	Appellants.

MR. JUSTICE GRANTY delivered the opinion of the court.

This is an appeal from an order, entered March 24, 1937, granting an interlocutory injunction upon complainant's petition filed, after discovery to the bill had been returned. Interpleur were obtained from entering judgment upon complainant's judgment note for \$50,000, (dated April 12, 1935, and nine months after date, and payable to the order of defendant bank) and from selling 1000 shares of the stock of the Wilson-Jones Lumber Company (hereinafter referred to as the Wilson-Jones Co.), held by the bank as collateral security for the note. Counsel for defendant contends that the allegations of the bill are insufficient to warrant the issuance of the injunction.

In the bill, filed January 11, 1937, complainant alleges in substance that, during the whole period of the events therein after mentioned, he was "the controlling stock owner and president" of the Wilson-Jones Co., and also "a large stock owner and a director" of defendant bank, and, since January, 1935, has been "the president of the board of directors of said bank and in control of said bank." That for the period from January, 1931, until January, 1935, he was the sole and confidential business adviser of complainant, and

complainant placed great trust and confidence in him and followed his advice as to investments, etc.; that early in the year 1921, complainant purchased from him certain bonds of the aggregate value of about \$250,000; that in July, 1921, he advised complainant to trade some of the bonds for stock in said Wilson-Jones Co.; that he represented that the stock, then worth \$50 per share, was a very good investment, etc.; and that, although no dividends were then being paid, the profits were being devoted to the extension of the company's business and to the retirement of its funded debt; that he stated that, if complainant would give him \$130,000 worth of the bonds at par value, he would deliver to complainant in exchange 4,000 shares of said stock (then worth \$200,000); that he further stated that the excess amount of \$70,000, over and above the par value of the bonds, "would be amply sufficient to make up to complainant whatever amount should be lost to him by reason of the stoppage of interest payments which he was receiving on said bonds, until such time as dividends would be paid on said stock;" that he "further represented and promised" that, if at any time thereafter complainant should be in need of money, he (Kulp) "would repurchase any amount of said stock up to 2,600 shares at the price of \$50 per share," if and when requested by complainant; and that complainant had no knowledge of the value of the stock, and no means of ascertaining its value except from Kulp, and, relying upon Kulp's said statements, representations and promises, delivered to him \$130,000 worth of said bonds at par value, and received from him in exchange 4,000 shares of the stock.

It is further alleged in the bill that, at the time said exchange or trade was made, "there existed a legal question as to whether or not complainant would be liable to pay an income tax on certain income received by him for the performance of

complaint placed upon him and mentioned in his report
his office as an investigator, etc.; that early in the year 1932,
complaint purchased from him certain bonds of the aggregate value
of about \$250,000; that in July, 1931, he advised complainant in
first some of the bonds for stock in said Illinois-John Co.; that he
represented that the stock, then worth \$50 per share, was a very
good investment, that, and that, although no dividends were paid
during 1931, the profits were being applied to the redemption of the
company's business and to the retirement of its bonds; that the
he stated that, if complainant would purchase \$100,000 worth of the
bonds at \$50 per share, he would deliver to complainant in exchange
5,000 shares of said stock (then worth \$500,000); that he further
stated that the interest of 10% was, very soon after the year
value of the bonds, "would be easily sufficient to make up to com-
plainant the interest amount should be paid to him by reason of the
absence of interest payments which he was receiving on said bonds.
and, that the 10% dividends would be paid on said stock," that he
further represented and promised "that, if at any time the
complaint should be in need of money, he [Karp] would purchase
any amount of said stock up to \$2,500 shares at the price of \$50 per
share," it was represented by complainant and that complainant
had no knowledge of the value of the stock, and no means of ascer-
taining its value except from Karp, and, relying upon Karp's word
complaint, representations and promises, delivered to him \$100,000
worth of said bonds at par value, and received from him in exchange
5,000 shares of the stock.
It is further alleged in the bill filed, at the time
said exchange on bonds was made, "there existed a legal obligation
on the part of Karp to pay to complainant
an amount of money received by him for the performance of

certain work and duties for the City of Chicago," which tax, if it should be decided that complainant was liable therefor, would amount to about \$130,000; that prior to the making of said exchange or trade complainant told Kulp that, in the event he (complainant) should be held liable to pay said income tax, he would require Kulp to repurchase 2,600 shares of the stock for \$130,000 and Kulp then and there promised so to do, and such promise was part of the inducement that led complainant to make such exchange or trade; that in the fall of 1923 it was determined that complainant was liable to pay said income tax and payment thereof was demanded of him; that complainant immediately notified Kulp and "requested him to repurchase a sufficient amount of said stock at \$50 per share to obtain to-wit, \$130,000;" that Kulp then and there agreed to do so, but stated to complainant that "he was short of cash and would have to borrow the money," and that he would do so from the defendant bank; that Kulp further stated that, as he was so closely connected with the bank, "it would not look well for him to borrow so large an amount on his own name," and that, if complainant would sign the note, "it was understood by him and said bank that the indebtedness would be that of Kulp and that he (Kulp) would pay it and would from time to time repurchase said stock and apply the purchase price towards the payment of said note;" that complainant, believing that Kulp would do so and relying upon said agreement between Kulp and the bank, signed and delivered to the bank an unsecured note for \$95,000, some time in the latter part of 1923 or the forepart of 1924; and that thereafter, at three different times, "\$5,000 was paid on the principal of said note." (It is not alleged who made these payments.)

It is further alleged that at no time has any dividend been paid on the stock, but that it is now more valuable and

worth \$75 per share; that on April 12, 1926, Kulp stated that a bank examiner, as well as certain directors of defendant bank, "had made objections to the carrying of complainant's said note (reduced to \$80,000 by said payments) unless it was secured by collateral," and further stated that, as he (Kulp) had agreed to repurchase the stock for the payment of said note, "it was only fair to him that 1,600 shares, thus to be used for repurchase and payment, should be put up as collateral security with said note," and further stated that, "if complainant would sign a new note for \$80,000 to fall due in nine months and put up said 1,600 shares as collateral, the stock would be used to liquidate the said indebtedness by purchase thereof by said Kulp at \$50 per share, and that, if the whole liquidation was not accomplished by the time the note fell due, the time of payment would be extended from time to time until said stock was so purchased and the indebtedness liquidated, and that the bank would look exclusively to said stock and said Kulp for the payment;" that complainant, relying upon Kulp's said promises and agreements, signed said new note for \$80,000, and delivered to Kulp and the bank said 1,600 shares of stock "in full settlement of said amount so far as any liability on complainant's part was concerned" and the same were accepted; but that now Kulp and the bank, scheming and intending to defraud complainant, have demanded that he pay said \$80,000 on the day said note falls due (January 12, 1927); that Kulp has stated that, "unless complainant delivers to him the four thousand shares of said stock for \$130,000, the bank will insist upon payment in full by complainant on January 12, 1927, and unless promptly paid will cause judgment on said note to be entered forthwith;" that Kulp and the bank have further threatened that, unless complainant sells to Kulp said 4,000 shares for \$130,000, they

"and such objection to the carrying of complainant's said note (reduced to \$80,000 by said payments) unless it was secured by collateral," and further stated that, as he (Klip) had agreed to reimburse the stock for the payment of said note, "it was only fair to him that I, Edna Brown, there to be used for reimbursement and payment, should be put up an collateral security with said note," and further stated that, "if complainant would sign a new note for \$80,000 to fall due in nine months and put up said I, Edna Brown as collateral, the stock would be used to reimburse the said indebtedness by purchase issued by said Klip at \$90 per share, and that, if the whole liquidation was not accomplished by the time the note fell due, the time of payment would be extended from time to time until said debt was as purchased and the indebtedness liquidated, and that the bank would look exclusively to said stock and said Klip for the payment." That complainant, relying upon Klip's said promise and agreement, signed with her name two \$80,000, and delivered to Klip and the bank said I, Edna Brown of stock "in full settlement of said account on my own liability as complainant's part was concerned" and the same were accepted; but that now Klip and the bank, combining and intending to defraud complainant, have demanded that he pay said \$80,000 on the day said note falls due (January 16, 1927); that Klip has stated that "unless complainant delivers to him the sum of \$80,000 before or said stock for \$180,000, the bank will insist upon payment in full by complainant on January 16, 1927, and unless promptly paid will cause judgment on said note to be entered forthwith;" that Klip and the bank have further threatened that, unless com-

will not only not extend the time of payment of said note, but will cause judgment to be entered thereon and will also sell said 1,600 shares at private sale at whatever price they can obtain therefor; and that complainant believes that, unless restrained, they will carry their threats into execution and thereby cause irreparable damage to him.

It is further alleged that said Wilson-Jones Co. is a close corporation, controlled and dominated by Kulp; that there is no market for its stock, and, without Kulp's consent, no information is obtainable as to its value; that, hence, at any sale of its stock there would be no competitive bidding; that if Kulp and the bank be permitted to sell said 1,600 shares, "in violation of the agreements above set forth," and hold complainant for the difference between the face of said note and the amount received for said stock, complainant would suffer irreparable damage, etc.; and that complainant has been informed by Kulp, and so states the fact to be, that the value of said 1,600 shares is in excess of \$80,000, and that, if said stock is applied towards the liquidation of said indebtedness, "its value will amply cover it."

After reviewing the bill we do not think its allegations are such as warranted the issuance of the temporary injunction as prayed. It is to be noticed that, when complainant signed and delivered his said \$80,000 note to the bank and deposited with it the 1,600 shares of stock as collateral security therefor, the bill does not allege that the bank was a party to the agreement alleged to have been made between Kulp and complainant. Indeed the theory of the bill is that, because of Kulp's close connection with the bank (he being chairman of its board of directors, etc.) said agreement between Kulp and complainant

will not only extend the line of payment of such note, but
all other payment to be rendered thereon and will also call
said 1,000 shares of private sale at whatever price they may
offer therefor; and that complainant believes that, unless
repealed, they will carry their shares into execution and
thereby cause irreparable damage to him.

It is further alleged that said 1,000 shares of

a class of securities, controlled and dominated by him, and
there is no market for the stock, and, without such a market,
no information is obtainable as to the value of the stock, and
any sale of the stock there would be an artificial thing;
that if help was the best he could get for said 1,000 shares,
the value of the agreement above set forth, and that
plaintiff for the defendant, between the date of said sale and the
amount received for said stock, complainant would suffer irre-
parable damage, and that complainant has been injured
by this, and as stated the fact is so, that the value of said
1,000 shares is an amount of \$20,000, and that, if said shares in
applied towards the liquidation of said indebtedness, the value
will only cover 10%.

After reviewing the bill we do not think the allegations
are well supported by the evidence of the defendant's testimony
as given. It is to be noted that, when complainant signed
and delivered his said \$50,000 note to the bank and deposited
with it the 1,000 shares of stock as collateral security therefor,
the bill does not allege that the bank was a party to the agree-
ment alleged to have been made between him and complainant.
Inasmuch as the bill is filed, however, of said 1,000 shares
connection with the bank, the being chairman of the board of
directors, etc., said agreement between him and complainant

is binding upon the bank upon the ground of notice thereof to it through Kulp. But the theory is untenable. It is well settled law in this State that "notice to an officer of a corporation is not notice to it in transactions where the officer is dealing with the corporation in his own interest and not in the interest of the corporation." (Metcalf v. Draper, 98 Ill. App. 399, 406; Higgins v. Lansingh, 154 Ill. 301, 388; Seaverns v. Presbyterian Hospital, 173 Ill. 414, 419; American Guaranty Co. v. State Bank, 244 Ill. App. 16, 29.) Furthermore, it appears from the bill that the bank, as the payee of the \$80,000 note, is the "holder" thereof. Section 190 of the Negotiable Instrument Law defines the word "holder" as meaning "the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof." (See, also, American Guaranty Co. v. State Bank, supra; Drum Construction Co. v. Forbes, 305 Ill. 303, 306.) And it further appears from the bill that the bank is a holder of the note "in due course," as defined in section 52 of said Law. It was signed and delivered to the bank by complainant as a renewal note for a former one of complainant's for \$95,000, on which \$15,000 had been paid. The bill does not allege that, when complainant signed and delivered said \$95,000 note, he did not receive a full consideration therefor in money, and the presumption is that he did. For aught that is alleged to the contrary the \$80,000 note is "complete and regular on its face," the bank "became the holder of it before it was overdue," and "took it in good faith and for value," and "had no notice of any infirmity in the instrument." By it complainant agreed, for value received, to pay to the bank \$80,000 on January 12, 1927, absolutely and at all events, and, as collateral security for its payment, he deposited with the bank the said 1,600 shares of stock. Furthermore, as we view it, the bill seeks to vary the terms of a

is a lien upon the bank upon the ground of notice thereof to it
 through the bank. But the theory is untenable. It is well settled
 law in this State that "notice to an officer of a corporation is
 not notice to it in transactions where the officer is dealing

with the corporation in his own interest and not in the interest
 of the corporation." (Hartford v. Hartford, 100 Conn. 307, 1920)

Hartford v. Hartford, 100 Conn. 307, 1920; Hartford v. Hartford,
 100 Conn. 307, 1920; Hartford v. Hartford, 100 Conn. 307, 1920

Moreover, it appears from the bill that
 the bank, as the payee of the \$50,000 note, is the "holder" thereof.

Section 190 of the Negotiable Instruments Law defines the word
 "holder" as meaning "the person to whom a bill or note, who

is in possession of it, or the person thereof." (See, also, Hartford
 v. Hartford, 100 Conn. 307, 1920; Hartford v. Hartford, 100 Conn. 307, 1920)

and it further appears from the bill that the
 bank is a holder of the note "in due course", as defined in Section

92 of said law. It was signed and delivered to the bank by complainant
 as a renewal note for a former one of \$50,000, for \$50,000,

on which \$50,000 had been paid. The bill does not allege that
 when complainant signed and delivered said \$50,000 note, he did not

receive a full consideration therefor in money, and the presumption
 is that he did. Yet ought that to alleged in the contrary the

\$50,000 note to "complete and regular on its face", the bank
 "became the holder of it before it was overdue," and "took it in

good faith and for value," and "had no notice of any infirmity in
 the instrument." If it complainant agreed, for value received,

to pay to the bank \$50,000 on January 12, 1927, absolutely and as
 all events, and as obligated security for its payment, he
 obligated with the bank the said \$50,000 share of stock. Further-
 more, as we view it, the bill seems to vary the terms of a

written contract between complainant and the bank by an alleged
parol agreement between complainant and Kulp, which cannot be
allowed. (Humford v. Tolman, 157 Ill. 255, 265; Farmer's State
Bank & Trust Co. v. Parr, 234 Ill. App. 73, 87; First National
Bank v. Wolf, 208 Ill. App. 233, 236; Security Savings Bank v.
Rhodes, 107 Neb. 223, 225.) We are of the opinion that the
Circuit court erred in issuing the temporary injunctive order
and, accordingly, it should be and is reversed.

REVERSED.

Barnes, P. J., and Wells, J., concur.

without content between complainant and the party by an alleged
partial agreement between complainant and party, which cannot be
allowed. (Henderson v. Johnson, 207 U.S. 458, 26 S.Ct. 1011, 52 L.Ed. 1131.)
Hark v. Tabor, 20 U.S. 100, 11 U.S. 100, 7 U.S. 100, 1 U.S. 100.
Hark v. Tabor, 20 U.S. 100, 11 U.S. 100, 7 U.S. 100, 1 U.S. 100.
Hark v. Tabor, 20 U.S. 100, 11 U.S. 100, 7 U.S. 100, 1 U.S. 100.
Directly stated in the opinion that the
and, accordingly, it should be and is reversed.

REVEREND

Reverend, J. L., and Father, L., members.

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Reverend, J. L., and Father, L., members.

Reverend, J. L., and Father, L., members.

JOHN L. FORSYTHE, for the Use of
MIDWEST COLLECTION BUREAU, a
Corperation,

Appellee,

vs.

FEISENHELD & DANIELS PAPER COMPANY,
a Corperation,

Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT

DELIVERED THE OPINION OF THE COURT.

This appeal is by the garnishee, Feisenheld & Daniels Paper Company, from a judgment in the sum of \$480, entered in favor of the garnisher, judgment creditor, upon the findings of the court.

The record shows that judgment was entered against John L. Forsythe, the debtor, on January 27, 1925, for the sum of \$492.62 and costs; that a demand in garnishment, dated October 9, 1925, was on that date served upon the garnishee, and also upon the judgment debtor the following day; that a summons in garnishment issued on October 13th and service was had upon the garnishee on October 15, 1925; that on December 5, 1925, the garnishee answered under oath that on October 15th, at the time the garnishee summons was served upon garnishee, it did not have in its possession any rights, credits, choses in action, effects, estate, property or moneys belonging to or due the said John L. Forsythe nor at any time since the service of said summons and up to the time of the filing of this answer.

Although the record does not show the form of traverse of the answer, the parties apparently treated it as contested; the garnisher filed interrogatories in writing, which the garnishee answered, and witnesses were heard upon the issues.

This report is up the pipeline, following a similar format to the previous one, and is being reviewed by the Bureau of the Census.

The record shows that Johnson was not a member of the I. O. O. F. Lodge, No. 1, on January 17, 1935, but the fact that he was a member of the I. O. O. F. Lodge, No. 1, on January 17, 1935, is not a sufficient basis for the conclusion that he was a member of the I. O. O. F. Lodge, No. 1, on January 17, 1935. The fact that he was a member of the I. O. O. F. Lodge, No. 1, on January 17, 1935, is not a sufficient basis for the conclusion that he was a member of the I. O. O. F. Lodge, No. 1, on January 17, 1935.

Although the record does not show the time of departure of the answer, the answer appears to have been received; the relation thus investigated in writing, which the Government considered, and likewise very hard upon the answer.

In response to the interrogatories the defendant by its secretary answered that John L. Forsythe was employed by the corporation as a paper salesman and was so employed on October 9, 1925; that his contract of employment was oral; that on October 9, 1925, he was indebted to the garnishee company in the sum of \$970 for advances made to him from July 1, 1925, meaning that the garnishee had lent to him an average of \$60 a week, the understanding of the witness being that it was money loaned; that on December 5, 1925, the judgment debtor was indebted to the garnishee company in the sum of \$1,500 for moneys advanced to him at an average of \$60 a week since July 1, 1925; that from October 9, 1925, up to and including December 5, 1925, the garnishee company had advanced to the judgment debtor an average of \$60 a week.

Upon oral examination of the witness it appeared that the first "loan or advancement" subsequent to October 9th was made October 21st, at which time he was given \$180; that subsequent to that time, on October 31st, he was given \$60; that during the month of November he received on the 7th \$60, on the 14th \$60, and on the 23rd \$60.

The testimony of the bookkeeper shows that it was usual during the time of Mr. Forsythe's employment to pay him \$60 each week; that Forsythe never repaid any of these amounts, and that the account had been closed by charging it off.

Mr. Daniels testified as to the conversation at the time that Forsythe was employed. He says: "Mr. Felsenheld said, 'I have known you a good many years and you have been around different firms, and we can't pay you any money. If you sell any goods we will give you one-half of the net profit we make, but we cannot pay you any money.' Then Forsythe said, 'Well, I will have to have some money to live on.' 'Well,' Mr. Felsenheld said,

'we will loan you money until you get on your feet, if you do get on your feet, with the understanding that that money shall be paid back to us. If you leave or don't make good, you shall pay that money back under all circumstances.' *** That was about all the substance there was to it."

Called as a witness under section 33 of the Municipal Court act, Mr. Daniels also testified as follows:

"Q. Isn't it a fact that you arranged with Mr. Forsythe to loan or advance him certain sums to be deducted from his commission? A. No, sir; we loaned him money, and it was to be paid back by him, and he acknowledged it when he left us. ****

Q. Was there any conversation at the time that it was arranged to make him these loans what they were for?

A. The conversation was, and distinctly understood by him, and in my presence more than once, when he was getting money he was told it was a loan.

Q. Was that for his expenses? A. It was distinctly understood when he came to work that the money we gave him was a loan and was to be paid back by him and that was what he agreed to do."

The garnisher contends that the \$60 a week advanced under the terms of this contract was not a loan but was a salary, and cites and relies upon a number of cases (in which, however, the garnishment law was not involved) holding that an advancement of this kind to one employed, which advancement is in all events to be paid back, if at all, out of future earnings, is salary. It is so held in substance in the cases cited and relied on. (Gannon v. Tyree, 148 Ill. App. 99; Felsenthal v. Grandwohl, 217 Ill. App. 170; Hall v. Bergstrom, 227 Ill. App. 567, and Nelson v. American Business Bureau, 241 Ill. App. 432.) All these cases are easily distinguishable from the facts which are here made to appear. The burden of proof in a case of this kind is, of course, on the garnisher, and the testimony of the secretary of the garnishee corporation to the effect that the advancements made were in the nature of loans and not of payments on account of salary, is not directly contradicted.

"We will have your money within ten days of your test, if you do not
 on your test, with the understanding that that money shall be paid
 back to us. If you leave it that money good, you shall pay that
 money back with all interest. If that was what all the
 witnesses there saw to be."

Called as a witness under section 13 of the Evidence
 Act, Mr. Hamilton also testified as follows:

"I am a little bit acquainted with Mr. Hamilton
 as far as anyone in the town is concerned. I was
 A. No, sir; we learned him money, and it was
 to be paid back by him, and he acknowledged it. He told
 me that my conversation at the time that it was
 made to make him learn that they were told
 the conversation was, and distinctly understood by
 him, and in my presence more than once, when he was telling
 me that it was a lie.
 Q. Was that for his money? A. It was distinctly
 understood when he came to work that the money we gave him
 was a loan and was to be paid back by him and that was what
 we agreed to do."

The grantor contends that this is a work agreement
 under the terms of this contract was not a loan but was a salary,
 and also that relief upon a number of occasions (in which, however,
 the grantor was not involved) holding that an agreement
 of this kind to one employed, which agreement is in all events
 to be paid back, if at all, out of future earnings, is salary.
 It is so held in substance in the cases cited and relied on.
Hamilton v. First Nat. Bank, 120 Ill. App. 321; Hamilton v. Hamilton,
 117 Ill. App. 190; Hamilton v. Hamilton, 107 Ill. App. 324, and
Hamilton v. Hamilton, 107 Ill. App. 324.
 These cases are easily distinguished from the facts which are
 here made to appear. The burden of proof in a case of this kind
 is, of course, on the grantor, and the testimony of the adver-
 sary of the grantor is competent to the effect that the agree-
 ment made was in the nature of a loan and not of payment on
 account of salary, is not directly contradicted.

But whatever our holding on this point might be, we think the garnisher was not entitled to recover on this record for another reason. By virtue of section 14 of the Garnishment act, as amended by an act approved June 30, 1925, (see Smith-Hurd Ill. Rev. Stat. 1925, pp. 1420-21) it is provided: "No employer so served with garnishment shall in any case be liable to answer for any amount not earned by such employee at the time of the service of the writ of garnishment." It is not argued that upon any adjustment made at the time of the service of the writ here, the garnisher would have been indebted in any amount to the judgment debtor. This statute as amended therefore precludes any recovery against the garnishee. Hudson v. Hudson Motor Co. of Illinois, 238 Ill. App. ³⁹¹, is cited and relied on by the garnisher; but apparently the amendment to the statute and the conflict between that case and First Nat'l Bank v. Mosier, 234 Ill. App. 605, were not urged upon the court.

For the reasons indicated the judgment is reversed with a finding of facts and judgment here for the garnishee, Felsenheld & Daniels Paper Company.

REVERSED WITH FINDING OF FACTS.

McSurely, J., concurs.

O'Connor, J., dissents.

FINDING OF FACTS.

We find as facts that at the time of the service of the writ of garnishment herein on October 15, 1925, the garnishee, Falsenhold & Daniels Paper Company, a corporation, did not have in its possession any rights, credits, choses in action, effects, estate, property or moneys belonging to or due to the judgment debtor, John L. Forsythe, and was not in any way indebted to him at any time after the service of said summons and up to the time of the filing of the answer.

TRULY WARNER CO., Inc.,
a Corporation, Appellee,

vs.

KAUFMAN HATS, Inc., a
Corperation, Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant from a judgment in favor of the plaintiff in an action for forcible detainer. The cause was tried by a jury, and at the close of the evidence, upon motion of the plaintiff, the court directed a verdict finding the defendant guilty of unlawfully withholding from the plaintiff the possession of premises and that the right of possession was in the plaintiff. Motions for a new trial and in arrest were over-ruled and judgment on the verdict was entered.

The premises involved are known as 109 West Madison street, Chicago. The complaint was signed, "Truly Warner Company, Incorporated, H. Foy Shannon, Dist. Mgr.," and was filed May 3, 1926.

The errors assigned and argued are the granting of plaintiff's motion for an instructed verdict and the refusal of the court to receive evidence which defendant claims tended to show that plaintiff was an unlicensed corporation, doing business in the State of Illinois, contrary to the statutes and therefore without right to maintain its suit. (See chap. 32, sec. 94, p. 627, Chaill's Ill. Rev. Statutes 1925.) There is no uncertainty as to the rule which should be applied, in this State, where an instructed verdict is requested. If there is any evidence from which, considered in the light of inferences most favorable to the

defendant, a jury could find in favor of the defendant, such an instruction for the plaintiff should not be given. (Libby, McNeill & Libby v. Cook, 222 Ill. 206; Balsewicz v. C. B. & Q.R.R. Co., 240 Ill. 238; American Art Works v. Chicago Picture Frame Works, 264 Ill. 610; Mahlestedt v. Ideal Lighting Co., 271 Ill. 154; Lakin v. S. S. Elevated R. R. Co., 148 Ill. App. 268; Knipping v. Chicago Tele. Co., 184 Ill. App. 48.)

When stripped of the argument of counsel which, contrary to our rule, embellishes the statement of facts, there is little doubt left as to the material facts in the case, and the same are comparatively few and simple.

The plaintiff is a corporation organized under the laws of the state of New Jersey. Its precise name is "Truly Warner Co., Inc." Its president is Truly Warner, who is also the president of a New York corporation known as Truly Warner, Inc.

The president of the defendant corporation is Benjamin H. Kaufman, and this corporation was in possession of the premises here in question under a lease made by the trustees of the Estate of Levi Z. Leiter to Benjamin H. Kaufman personally. This lease, by its terms, expired on April 30, 1926.

The premises are owned by the Leiter Estate. Defendant contends there is no competent proof of this fact, but the record shows slight but sufficient prima facie proof, which evidence was received without objection. This fact is also a necessary inference from statements made by the defendant in written correspondence with the trustees of the said estate extending from July, 1925, to October 19th of the same year. On that date the trustees withdrew an offer theretofore made by them to enter into a lease with the defendant demising these premises to defendant for another term.

On October 20, 1925, defendant at New York mailed to the Estate of "Z. L. Leiter" a letter stating in substance that it would accept a lease upon terms theretofore proposed by the trustees,

but, as already stated, the offer to lease had been definitely withdrawn before this acceptance; and, moreover, the terms of the proposed lease were such that it would not become a valid agreement until signed by the trustees. It was offered in evidence but excluded (and properly) because there was no competent proof of its execution and delivery.

The defendant, without right, made a claim to possession under this alleged lease, and upon the expiration of the lease formerly made to Kaufman, which by its terms expired April 30, 1926, defendant remained in possession of the premises and retained the possession although same was demanded by plaintiff. The claim of plaintiff is under a written lease dated October 19, 1925, whereby "the trustees under the last will and testament of Levi Z. Leiter, deceased," demised the said premises for a term beginning on the 1st day of May, 1926, and ending on the 30th day of April, 1931. This lease is in evidence, is under seal and is signed by Nancy Lathrop Carver Campbell by Joseph Leiter, attorney in fact, Joseph Leiter and William J. Warr, who are therein described as "trustees under the last will and testament of Levi Z. Leiter, deceased," and also signed Truly Warner Co., Inc., by "Truly Warner, Pres." The lease is under the seal of the corporation, and the genuineness of the signatures of the persons assuming to act as trustees was proved without contradiction, and the delivery of the lease also was proved.

Some of the points made by the defendant are hardly worthy of extended discussion. We have already stated the facts which justified the exclusion of the supposed lease under which defendant claimed. Even less meritorious is the contention made that the evidence fails to show that the defendant is actually in possession of the premises, notwithstanding the fact that the evidence of Mr. Kaufman, the president, was to the contrary. This contention is entirely inconsistent with statements made by defendant in the extended

...in actively stated, the office of the ...
...these before this commission; and, moreover, the ...
...these before this commission; and, moreover, the ...
...these before this commission; and, moreover, the ...
...these before this commission; and, moreover, the ...
...these before this commission; and, moreover, the ...

The defendant, without right, made a claim to possession
...under this alleged issue, and upon the expiration of the lease
...made to defendant, which by the terms expired April 30, 1935,
...remained in possession of the premises and retained the
...through some was demanded by plaintiff. The claim of
...a written lease dated October 12, 1933, whereby
...the premises under the lease will not terminate at May 1, 1935,
...the said premises for a term beginning on the
...and ending on the 30th day of April, 1935.

This lease is in evidence, is under seal and is signed by Henry
...attorney in fact, Joseph
...William H. Watt, who was therein described as "attorney
...the last will and testament of Earl E. Watt, deceased," and
...by "Truly Yours, Wm. H. Watt." The
...of the corporation, and the government of
...as an attorney was proved
...and the delivery of the lease also was proved.

Some of the points made by the defendant are hereby
...We have already stated the facts which
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...the defendant is the plaintiff and the

Correspondence which took place between plaintiff and defendant prior to the expiration of the lease under which defendant occupied the premises. Likewise without merit is the further contention of defendant that the lease introduced in evidence by the plaintiff fails to show that plaintiff had a right to the possession of the premises at the time of the beginning of the suit. The correspondence to which we have already referred and the necessary inferences which may be drawn therefrom indicate at least prima facie the right of these trustees to give a valid lease of the premises. It is elementary that in a proceeding of this nature the title to the premises is not necessarily involved, and if there were defects in the execution of the lease under which the plaintiff claims, the same are not such as the defendant, who, the record affirmatively shows, has no right either of possession or title, would have any standing to urge. If the defendant has no right to the possession of these premises, as affirmatively appears from this record, it has no standing to urge that one or more other trustees of the Leiter estate should have joined in the execution of the lease to plaintiff, nor any standing to question the authority and right of the trustees who made the lease in question.

The controlling question in the case is raised by defendant's contention that as plaintiff is a foreign corporation, organized for pecuniary profit and doing business in Illinois without having obtained a license, it is by virtue of section 94 of chapter 32 of the Illinois Rev. Statutes precluded from maintaining this suit in the courts of Illinois.

Irrespective of the merits of this contention, the plaintiff contends (and the court upon the trial of the cause ruled) that evidence tending to prove this defense was not admissible because the defendant had not set up the same in a written affidavit prior to the beginning of the trial. Said section 94 is

a part of the General Incorporation act, in force July 1, 1919,
and it provides as follows:

"No foreign corporation doing business in this State without a license shall be permitted to maintain any suit at law or in equity in any of the courts of this State upon any demand, whether arising out of contract or tort; and all such corporations shall be liable by reason thereof to a penalty therefor of not less than two hundred and fifty dollars nor more than one thousand dollars, to be recovered in any court of competent jurisdiction, in a civil action to be begun and prosecuted by the Attorney General."

The rules of the Municipal court of Chicago are made a part of the record. Rule 11 provides:

"In any action by or against a corporation, it shall not be necessary to prove the existence of such corporation, or that it sues or is sued by its corporate name unless, previous to the commencement of the trial, the corporate existence of such plaintiff or defendant, or that its name is correctly stated, is denied by affidavit, signed by the party making such denial or by his agent or attorney."

Rule 12 provides:

"The defendant shall, by motion to dismiss, supported by affidavit, set up such matters in abatement as would be set up in the Circuit court by plea in abatement supported by affidavit."

Upon the trial the defendant offered in evidence a certificate of Louis L. Emerson, secretary of state, in which it was stated that an examination of the records of his office did not disclose a corporation, either domestic or foreign, with the name of plaintiff; this certificate was excluded upon the theory that it was not admissible in the absence of an affidavit under the rule of court. The defendant says that rule 11 was not applicable since the purpose of the evidence offered was not to disprove but on the contrary to affirm the existence of the foreign corporation. This argument is not without force, but even if this be conceded it remains to determine whether the defense which was here sought to be interposed was in the nature of matter in abatement. If it was, then rule 12 was clearly applicable and the defendant would have no right to introduce evidence on this point in the absence of an affidavit as provided by the rule. Whether a defense under section 94 is

such matter as would be required to be set up in the Circuit court in a plea of abatement has never, so far as the briefs disclose, been decided by the courts of this state. However, under an analogous statute this defense seems to have been presented by this method. (Marl Mfg. Co. v. Summit Lbr. Co., 125 Ill. App. 391.)

In 1 Corpus Juris, 119, it is stated:

"The objection that a plaintiff foreign corporation is incapable of maintaining an action because it has not appointed a resident agent, or otherwise complied with the statute imposing conditions precedent to the right of foreign corporations to sue, is usually held to be ground of abatement only."

In the same volume, p. 110, it is stated:

"If there is a cause of action, but action is brought without performance of a condition precedent to the right to sue thereon, this objection is ground for abatement of the action and must usually be so pleaded. If, however, non-performance of the condition goes to show that there is no cause of action at all, it is matter in bar and cannot be pleaded in abatement."

An examination of cases in jurisdictions which have a system of pleading similar to our own discloses that a defense of this nature is usually presented in this way. (See Nat'l Fertilizer Co. v. Fall River, etc. Bank, 196 Mass. 458.) Such it appears was the practice in the Municipal court of Chicago in the case of Museum of Fine Arts v. Dicus, 207 Ill. App. 369, the question not being raised, however, in that case. In Puterbaugh's Common Law Pleading and Practice, 10th ed., sec. 230, p. 360, the author states:

"The defense that plaintiff is a foreign corporation doing business in this state without having obtained a license is properly pleaded in bar."

This statement seems to be based on Metropolitan Discount Co. v. Fitch, 208 Ill. App. 407, another case in which apparently the precise question was not raised. The distinction between pleas in abatement and pleas in bar has been pointed out by the Supreme court in the case of Pitts Sons' Mfg. Co. v. Commercial Nat'l Bank, 121 Ill. 582. The court there says:

"A plea in abatement is defined to be, a plea that, without disputing the justness of the plaintiff's claim, objects to the place, mode or time of asserting it, and requires that therefore, and pro hac vice, judgment be given for the defendant, leaving it open to renew the suit in another place or form, or at another time; while to the second class belong all those pleas having for their object the defeating of the plaintiff's claim. Hence, a plea in bar of the action may be defined as one which shows some ground for barring or defeating the action, and makes prayer to that effect. Pleas in bar and pleas in abatement have, therefore, this marked distinction: Pleas in bar are addressed to the merits of the claim and as impairing the right of action altogether, whereas pleas in abatement tend merely to divert, suspend or defeat the present suit. 1 Saunders' Pl. and Ev., 1, 2; Comyns' Digest, title 'Abatement'; 1 Chitty's Pl. 441."

Is the plea to the effect that a plaintiff foreign corporation ^{is} precluded by reason of the statute from suing in this State without first complying with the provisions of the foreign corporation law, a defense that goes to the merits of the action? As a matter of first impression, the answer is no. Undoubtedly, however, in states where the statutes having reference to such subject matter declare the contract shall be void, such would be the effect. The statute of this state is not limited to contracts made in the State of Illinois. It seems to deny to a plaintiff the right of maintaining an action in our courts upon any cause of action at law or in equity wheresoever the same may have arisen. A plaintiff or a complainant prevented by statute from maintaining its suit in Illinois might maintain that suit in another state or in the federal courts.

The present corporation law went into effect July 1, 1919, and so far as we are advised there is no decision of the Supreme court of this state construing section 94 of the law. This section is cited in Automotive Material Co. v. American Standard Metal Prod. Corp., 232 Ill. App. 532, and in that opinion this court held that a contract of an unlicensed foreign corporation made in this state was void, basing its decision, however, upon cases each and all of which construed other sections of other statutes. Indeed, the leading case there relied upon is Cincinnati Mutual Health As-

urance Co. v. Rosenthal, 55 Ill. 85, a case which involved the law as applicable to insurance contracts which are expressly excepted from the operation of the present law. United Lead Co. v. J. W. Reedy Elevator Mfg. Co., 222 Ill. 199, was also cited and relied on, but an examination of that case discloses that the sections there construed refer to parts of an act which became effective on July 1, 1899, which provided not only for a penalty for failure to take out a license, but also for neglect or failure to comply with other conditions named in the act. The conditions required in that act differ materially from those set forth under the provisions of the present law. That decision in substance held that the defense was interposed as a bar to the action, and under the plain provisions of the statute the contract sued on was null and void. It is worthy of note, however, that apparently the case of Watertown Fire Ins. Co. v. Rust, 141 Ill. 85, holding in substance that a defendant foreign corporation was estopped to set up the defense that the contract was void when sued by the plaintiff with whom defendant had illegally contracted, was not called to the attention of the court. Other cases cited and relied on there purported to construe the act of 1905, chap. 32, secs. 67B to 67J, Hurd's Ill. Rev. Statutes 1925; but in these decisions the court does not hold that the contract sued on is null and void, although Cincinnati Mutual Health Assurance Co. v. Rosenthal, and United Lead Co. v. J. W. Reedy Elevator Mfg. Co., *supra*, are cited with apparent approval.

The federal court for the southern district of Ohio had occasion to construe the law of 1905 in Meador Furniture Co. v. Comm'l Nat'l Safe Deposit Co., 192 Fed. 616, in an opinion handed down in July, 1911. The court there pointed out that the decisions cited from the Supreme court of Illinois had been rendered under the acts of 1897 and 1899, and declined to hold that these decisions were

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The Federal court for the southern district of Ohio had occasion to construe the law of 1908 in Hendrix v. Hendrix, No. 7, 1908, 12 O. 2d 103. In an opinion handed down in July, 1911. The court there pointed out that two decisions cited from the Supreme Court of Illinois had been reversed under the act of 1907 and 1908, and declined to hold that those decisions were

applicable to the act of 1905, the opinion stating:

"I hold, therefore, that at the time the plaintiff and the defendant entered into their contract of December 28, 1905, the Supreme Court of Illinois had made no construction of the law of May 18, 1905, at all, and that the principle involved in the statute of 1895 does not apply to the statutes of 1897, 1899, and 1905."

Discussing the general rule to the effect that an illegal contract is void and unenforceable, the court stated there were exceptions to it, citing with approval Dunlop v. Mercer, 156 Fed. 545, stating:

"It is not universal in its application. It is qualified by the exception that where a contract is not evil in itself, and its invalidity is not denounced as a penalty by the express terms of or by rational implication from the language of the statute which it violates, and that statute describes other specific penalties, it is not the province of the courts to do so, and they will not thus affix an additional penalty not directed by the lawmaking power."

We must assume that when the act of 1919 was passed by the legislature it was not unfamiliar with this construction of the prior act, and it is only fair to presume that if it had been the intention of the legislature to have made the contract of an unlicensed foreign corporation absolutely void, it would have said so in no uncertain terms. Such also had been the construction put upon the somewhat similar section 15 of the General Incorporation law of New York by the Supreme Court of the United States in David Lupton's Sons v. Auto Club of America, 225 U. S. 489, decided June 7, 1912, and such was the decision of the Court of Appeals of New York in Mahar v. Harrington Park Villa Sites, 204 N. Y. 231, the New York court holding that under that section simply a disability to sue was created, and that the contract remained valid and effective in all other respects. In Model Heating Co. v. Magarity, 81 Atl. 394, Lawyers' Report Annotated, 1915 B, vol. 54, L. R. A. N. S., the question of the validity of a contract made by a non-complying foreign corporation was considered in an opinion rendered on October 16, 1911, and it was there held in substance that where a contract

is not made void by the statute or declared to be so by the state court, but the statute merely prohibits unqualified corporations from maintaining an action thereon, the corporation may nevertheless maintain an action in the federal courts, since the federal courts will not refuse to enforce a contract valid in itself merely on account of non-compliance with statutory regulations of this kind. It was also held in that case that the matter was properly put in issue by a special plea in abatement.

It is difficult to believe that the legislature of Illinois was ~~unaware~~^{if} of these decisions of the courts, and if so, it would seem ~~that~~^{if} it had intended to provide that contracts by unlicensed foreign corporations should be absolutely void, the statute would have said so. If such a contract, then, is not absolutely void, we think it necessarily follows that the defense which the defendant sought to interpose to this suit was not to the merits, and not being to the merits would, in the Circuit court, have been necessarily raised by a plea in abatement, and that therefore, under the rule of the Municipal court, defendant was precluded from presenting this defense because it had not set up this matter of abatement by affidavit, as required by the rule.

It should be noted in this connection also that no evidence was offered or received tending to show that the lease upon which the plaintiff relied was one made within the state of Illinois, and there was no presumption certainly that it was made here. It has been held that a law purporting to make such a contract entered into in a foreign state invalid, would be unconstitutional and, for that reason, even under the statutes of 1899, the law was held not applicable. Havens & Geddes v. Diamond, 93 Ill. App. 557. To the same effect, in construing the law of 1905, is the case of Class Journal Co. v. Harlan, 215 Ill. App. 9. Moreover,

is not made void by the statute or declared to be so by the state court, but the statute merely prohibits judicial enforcement. These rulings are correct, and the statute is not unconstitutional. It is not an action before the federal court, since the federal court will not refuse to enforce a contract valid in itself merely on account of non-compliance with statutory regulations of the kind. It was also held in that case that the matter was properly put in issue by a special plea in abatement.

It is difficult to believe that the legislature of Illinois was unaware of these rulings at the time, and it is not to be supposed that it intended to provide that contracts in violation of the law should be enforceable. It is not the case, as it would have been, if such a contract, then, is not enforceable void, we think it necessarily follows that the law was valid. The defendant would be liable in damages as well as in costs, and not being so the matter would, in the federal court, have been necessarily raised by a plea in abatement, and that, therefore, under the rule of the federal court, defendant was protected from presenting this defense because it had not set up this matter of abatement by affidavit, as required by the rule. It should be noted in this connection also that no

evidence was allowed or received tending to show that the laws upon which the plaintiff relied was one made within the state of Illinois, and there was no suggestion certainly that it was made there. It has been held that a law purporting to make such a contract enforceable in a foreign state invalid, would be unconstitutional and, for that reason, even under the statutes of 1890, the law was held not applicable. Harmon & Nathan v. Harmon, 93 Ill. App. 507. To the same effect, in construing the law of 1890, in the case of State v. Harmon, 93 Ill. App. 511. However,

if it was incumbent upon the defendant to file an affidavit setting up the nature of its defense, that affidavit would have been insufficient unless it had averred that the action brought did not arise out of a transaction had in interstate commerce. Bamharger Stern Co. v. Anderson, 207 Ill. App. 232. Even if we should regard it as unnecessary that the affidavit should have been filed, defendant neither gave nor offered evidence tending to show this negative essential, without which its defense could not be maintained. Again, without finding it necessary to decide the matter, there is some doubt whether the provision of the statute which forbids the maintaining of any suit at law or in equity can be construed as applicable to a suit for forcible detainer. It has been held in Wentworth v. Sankstone, 233 Ill. App. 38, that such a suit is not of such a nature that judgment entered therein could be reviewed by a writ of error, it being simply a summary statutory proceeding. See, also, Ferkel v. Columbia Clay Works, 192 Fed. 119.

For the reasons already indicated, we hold that the instruction to the jury to find for the plaintiff was properly given, that no material evidence properly offered was excluded, and that the judgment should be and it is affirmed.

AFFIRMED.

O'Connor, J., concurs.

McSurely, J.: I concur in the conclusion but not in all that is said in the opinion.

It is not inconsistent with the evidence in this case to conclude that the witness at the hearing, that affidavit would have been made. It is not inconsistent with the evidence that the witness at the hearing did not make out of a statement but in fact made a statement.

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GEORGIA THOMAS, Administratrix of the
Estate of Samuel F. Thomas, Deceased,
Appellee,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD
COMPANY, a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT

DELIVERED THE OPINION OF THE COURT.

The plaintiff, administratrix of the estate of her deceased husband who died on or about June 24, 1925, as the result of injuries sustained by him in the course of his employment by the defendant, a common carrier engaged in intra and interstate commerce, brought an action under the Federal Employers' Liability act, Barnes' Federal Code, section 8069, for the benefit of the next of kin, and the jury returned a verdict against defendant for \$32,500, upon which the court, over-ruling motions for a new trial and in arrest, entered judgment.

The declaration of five counts in varied legal phraseology charged negligence generally in the management and operation of the engine and cars in the moving of which the deceased was acting as a switchman; in moving the same at a high and dangerous rate of speed; in failing to keep the switching crew in communication with each other, particularly the rear switchman, whereby they failed to communicate signals; in failing to keep a proper lookout for the deceased; in ordering deceased and others to perform their work in a negligent manner, and in directing the engineer to propel the engine in a westward direction without ascertaining whether the deceased was in a place of safety.

The errors assigned and argued are that the court erred in denying defendant's motion for a directed verdict, there

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being no proof of negligence by defendant proximately causing the injuries to the deceased, no proof that the deceased and defendant were engaged in interstate commerce at the time of the accident, and further, that the court erred in its rulings on the admission of evidence.

The material facts seem to be practically uncontradicted and are as follows:

The deceased had been in the employ of the defendant for about eight years, except during a strike, and was 39 years of age and in excellent health. There was no eye-witness of the actual occurrence which resulted in his death, but the deceased was a good up-to-date switchman, careful, industrious and prudent.

On the afternoon of June 25, 1925, at a quarter to five o'clock he left his home to be at work at 5:15, city time. At 4:15 p. m. standard time, he went to work as one of a switching crew of five, of which Mr. Hutchinson was conductor. The crew worked first at Western avenue, then at Hawthorne, then pulled a carload of horses to the Park Row station of the Michigan Central railroad, and from there went to the Morgan street yards of the defendant, where the accident occurred. The crew went there under orders of the general yardmaster, the order being "to switch the team tracks," and when they arrived there the yardmaster at Morgan street again directed the conductor "to switch the team tracks." The conductor's book or switching list is not in evidence. There were four team tracks in the yard, but up to the time of the accident the work of the crew consisted of switching cars from #3 track. Each car which was to be moved had a card placed thereon, upon which was written the word "pull." The team track foreman kept track of the cars, but he was not present that night.

The tracks in question were located north of Sixteenth

street and parallel thereto and were elevated. Four of the tracks were called "team tracks." On these team tracks cars were stored so that consignees might drive up to the cars standing on these tracks and unload merchandise consigned to them. The most southerly of the tracks was called #1, and between #1 and #2 team tracks was a roadway, on which vehicles might drive alongside of the cars standing on these two tracks. North of the roadway was team track #2 and north of #2 was team track #3; north of #3 was another roadway for a use similar to that which has already been described, and north of team track #4 were a number of yard tracks. North of the yard tracks were main line tracks over which the main line trains of the defendant passed. These main line and yard tracks were numbered from the north to the south. Main line track #1 was used for westbound trains, main line track #2 for eastbound trains; tracks numbers 3, 4, 5, 6, 7 and 8 were yard tracks. The team tracks numbers 1, 2, 3 and 4 were connected with and were entered from the west only through a long diagonal track extending north and west and known as #8 lead track, which was a continuation of #8 yard track. East on #8 lead track, a short distance west of Morgan street, was a branch track leading off to the southeast, known as team track #3, and this team track had two branches. Farther east on #8 lead track was a branch track leading off to the southeast known as team track #4. Lead track #8 was known as yard track #8.

The switching crew consisted of five members, namely, the engineer, the fireman, the conductor and two switchmen.

When the crew arrived at the yards they found twenty cars on track #3. The pilot of the engine was facing east as it came in on this track. It had been backed west on #8 in order to come in on #3. All the cars on the team track were coupled together. They tied onto the twenty cars and cut off the most

easterly one, then started back with nineteen cars, going over the switch lead onto #8. They left one car, the second from the rear, on the lead track from #8, then went west again, kicked the empty car, called the automobile car, in on #8, having been directed so to do by the yardmaster, who had come along and who directed the conductor to hold out this car. The cars were then shoved back west over #3 lead, then down #8 lead to the place where the car which had been pulled off the team track had been cut off.

Hutchinson, the conductor, made the coupling on that car, and just prior to this, Thomas, the deceased, walked down on the other or north side of the train and the other members of the crew waited. The conductor's order to Thomas was to cut off three cars which it was desired should be kicked in on #8. The conductor told him to ride the cars in and set the brakes on them. In order to do this it was necessary for Thomas to climb on top of the cars and set the brakes after first pulling out the coupling pin which held the cars together. It was dark, in fact then near midnight, and Thomas carried a lantern. There were eighteen cars in the train at this time, and each car was about forty feet long. The cars were on the lead, which at this place curved to the northwest. The conductor was on the ground, and the other switchman was about at the curb, in sight of the conductor, whose signals he could transmit to the engineer. Thomas was on the west end of the third car from the rear, and by the way they were facing he was on the north side of the train. Hutchinson said, "The train was between me and him. I stood where I was when I gave the signal. I couldn't see Thomas after he passed me on the car. I could not see a signal if he gave one. I could not tell what position he was in or what he was doing at any time after that. There was no other employe there that could see him and transmit to me what he was doing." Hutchinson gave the signal and the

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cars moved at a speed of about fifteen miles an hour and moved about four car lengths at that speed, when Hutchinson gave the stop signal and in response thereto the engineer stopped promptly, the train moving probably a car length or so before it stopped altogether. At the time the conductor gave this sign he did not see Thomas and did not know what he was doing, except that he supposed he was doing as he was told, namely, to make the cut, ride the car in and set the brake. The conductor did not know whether the cut had been made when he gave the stop signal, or whether the cars to be cut off had been moved from the cars to which they were attached, but he supposed they had become disconnected and separated from the rest of the cars, because Thomas, as the conductor says, "generally got the cuts, and I always had great confidence in him, and as a rule I was right." It was the intention of the conductor when he made this stop to send more cars in on the track on top of the three cars. The next eight were pulled back over the switch and kicked back in on the team track. It was the intention to set the seven cars back on #3 and throw the empties back on track #8. The conductor supposed that the cut had been made by Thomas and the three cars kicked according to his directions. He then signalled the engineer to back up west, and the engine was backed in that direction. He had not seen Thomas and had not known where he was. He gave the signal and when the train had moved a couple of car lengths he discovered that they were pulling ten cars instead of seven. He signalled the engineer to stop the train, which was done. When the train stopped the conductor went to the east end of the ten cars, where he found the body of Thomas lying across the north run of track #8 and east of the most easterly car. Thomas had carried a lighted lantern, which was found but a few feet from where the body lay. Blood was found between the west end of the car on which he had last been seen, which was the third car

from the rear and the fourth car or the next car to the west. There was blood also on the wheel of the car which it was supposed he had cut off and also on the fourth car. The bones of both his arms were broken and at about the same place; the bones protruded through the flesh but the flesh was not scraped or bruised.

Is there evidence in this record from which a jury could reasonably find that defendant was guilty of negligence which proximately tended to cause the death of Thomas? It must, we think, be conceded (indeed, defendant hardly contends otherwise) that defendant was guilty of negligence. The work was hazardous under all the circumstances, even when performed in a way most careful. There seems, even to a layman, no reason why in performing these dangerous movements, the work should not have been done in such a way that the switching crew would have at all times been in communication with one another. Expert witnesses testified that this was the usual way in which movements of this kind were executed, and that such evidence is competent and proper for a jury to consider we shall later see. Defendant, however, contends that conceding this negligence, if any, it had nothing whatever to do with causing the accident; in other words, it was not the proximate cause of the intestate's death.

Defendant, speaking by its counsel, says:

"But we submit that in the entire absence of evidence tending to show what Thomas was doing or where he was, whether in the stirrup, or climbing the ladder, or on top setting the brake, or even on the ground, as counsel at one place suggests, with the uncertainty as to whether the cars ever uncoupled or, having been uncoupled again recoupled, or even that Thomas ever tried to uncouple them by raising the pin-lifter, it cannot be successfully asserted that Hutchinson's not keeping Thomas in view had anything to do with the accident."

Defendant cites a large number of cases from different jurisdictions holding in substance that a jury may not base a presumption upon a presumption, and as stated in Gregory's Adm'x. v. Director General of Railroads, 242 S. W. 373:

"Where under all the evidence the injury could as well be attributed to the negligence of defendant or to some other cause independent of that negligence and for which defendant would not be responsible, the case should not be submitted to the jury."

Or, as stated in Schaff v. Ferry, 232 Pac. 407, (another case on which defendant relies) where the theory of plaintiff was that the death of deceased resulted from the operation of a defective brake but there was no direct proof that he actually attempted to operate the same, the court said that there was a hiatus in the evidence. The sum and substance of these cases is that inferences from circumstances where there is no eye-witness must be reasonable, and that the finding of the jury must be based on facts which would justify the conclusion that there was a causal connection between the negligence and the injury.

It would, we think, be unprofitable to review at length the numerous cases cited in the reply brief, and it may well be doubted whether any one of them contains argument more persuasive than that found in the opinion of the court in G. M. & St. P. Ry. Co. v. Coogan, Adm'x, 46 U. S. Sup. Ct. Rep. 564, which is cited and relied on in defendant's original brief. Moreover, a consideration of that case is found more instructive than the many cited from other jurisdictions, because the highest court of the land was there construing a case which arose under the law upon which the suit here is based. In that case the deceased was a switchman whose duty it was to couple the airhose between two cars of a train that was being made up; there was evidence tending to show that while performing that duty he was killed and injured by a movement of the train. The negligence alleged was that about twelve inches south of the south rail of the track and fastened to the ties by clamps and spikes was an air-line pipe which had been installed several years prior to the time of the accident and which the defendant had permitted to become loosened and bent toward the rail and upward, leaving a space of from three and a half to four inches between it and the ties. The theory

of the plaintiff was that the deceased brakeman went in, as was his duty, to couple the hose between the caboose and the rear car; that he stepped inside with his right foot, leaving his left foot between the rail and the air pipe line; that, stepping to reach the airhose, his left foot slipped backward under the bent pipe and before he had time to make the coupling the cars had been started backward in a movement to clear the switch; that his left foot was caught under the pipe and he was forced backward, run over and killed. That the case was close is indicated by the fact that the Supreme court of the State of Minnesota (see 160 Minn. 411; 200 N. W. 477) affirmed the judgment of the trial court entered upon the verdict of the jury. The opinion of the Supreme Court of the United States indicates, however, that there was no proof there of the time at which the deceased undertook the particular duty of coupling the airhose, and that it might have been performed at any one of several times. It was necessary, therefore, for the jury to infer that this duty had been performed at one time and not at another, of which there was no proof. It was further necessary for it to infer that the deceased went between the cars as claimed, putting his right foot between the rails and leaving his left foot outside, and also upon that inference to base the further inference that the left foot was caught under the bent pipe. The only evidence from which this fact could be inferred was that the outside of the counter of the left shoe worn by the deceased was scratched and showed a marked depression parallel with the sole and just above the heel, - a condition which was first noticed some days after the accident, the shoes having in the meantime been in a garage where no attention was given to them. It is not ordinarily difficult to distinguish any one of these cases from any other as to particular facts; but the facts which distinguish the last cited

of the difficulty was that the witness did not see the
the fact, he could not have seen the witness and the
and, that he thought inside with his right foot, leaving the left
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was no great fault of the time at which the accident happened
the possibility of swinging the change, and that it might
have been prevented at any one of several places. It was neces-
sary, therefore, for the jury to find that this was the case
because at the time the wire was broken, it was found that the
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where no attention was given to them. It is not ordinarily al-
lows to distinguish one of these cases from any other as to
whether it was; but the facts which distinguish the last case

case and the one we are here considering are many and obvious.

In this case it is the theory of the plaintiff that the deceased was thrown from the car on which he was riding while engaged in the performance of his duties and endeavoring to uncouple the cars or stop them, and that he was run over by the westward movement of the three cars when the conductor erroneously assumed they had been detached from the seven cars which he intended to move. The evidence leaves little if any doubt that the deceased was on the west end of the third car and that he was either trying to uncouple the cars or stop them. The location in which the body of the deceased was found and the lantern which he carried, the character of the injuries sustained by his body, all lead to the conclusion that when the cars were moved for the second time he was thrown or caused to fall between the ends of the third and fourth cars. The blood on these two cars speaks eloquently to this effect. Indeed, as the plaintiff contends, the facts and circumstances proved would almost seem to exclude any other hypothesis. This being established, it is entirely reasonable to believe that he was thrown or caused to fall by the movement of the car, which movement would not have been made if the crew had at all times remained in communication with one another. The result was one which might reasonably have been foreseen and probably would have occurred at any time, under all the circumstances, upon the failure of the crew to adopt this necessary precaution.

It is, moreover, significant that the defendant in its brief does not present a hypothesis explaining reasonably in what manner the death of plaintiff's intestate was brought about. There is no hiatus in the evidence here, as in the cases cited. On the contrary, the evidence leaves, we think, little doubt upon material facts necessary to a finding, however much doubt

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there may be as to certain immaterial matters connected with the manner in which the injury occurred. It is of course impossible to have every fact connected with the death of a person where there is no eye-witness established so conclusively as to shut out all surmise and guess and conjecture; but the material facts here, namely, that the deceased was in the line of his duty; that defendant was negligent, and that as a result of that negligence an order was given bringing about a movement which threw him from the car and resulted in his death, may reasonably be inferred from the evidence. Moreover, it must be remembered that the law under which plaintiff sues has materially changed the rules applicable to suits for negligence as the same existed at common law. Contributory negligence, for instance, unless it can be said to be the sole and only cause, does not bar recovery, and the negligence of the defendant need only be such as in part contributes to the injury.

We hold that the jury might properly find, not only that the defendant was negligent, but that its negligence was the proximate cause of the death of plaintiff's intestate.

The next question which arises on the record is whether there was any evidence from which the jury could reasonably find that the defendant and the deceased at the time he was injured were engaged in interstate commerce. It was necessary for the plaintiff to establish the affirmative of this proposition. (G. & A. R. R. Co. v. Industrial Commission, 290 Ill. 599; Pederson v. D. L. & W. R. R. Co., 229 U. S. 146; I. C. R. R. Co. v. Pahrang, 233 U. S. 473.) If the evidence is conflicting, the question thus raised is for the jury. (Brown v. Ill. Terminal Co., 219 Ill. 326; White v. Jackson, 221 Ill. App. 129; Pennsylvania Co. v. Donat, 239 U. S. 50; Louisville & N. Ry. Co. v. Parker, 242 U. S. 13; Southern Ry. Co. v. Puckett, 244 U. S. 571; Erie R. R. v. Szary,

253 U. S. 86.) As was stated in Pedersen v. D. L. & W. R. R. Co., supra, "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?" Or as was said in the later case of Shanks v. D. L. & W. R. R. Co., 239 U. S. 556: "The true test of employment in such commerce in the sense intended is: Was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?" In Industrial Commission v. Davis, 259 U. S. 182, the court stated that it refused to lay down "a precise ruling" that would enable "an instant undisputed application," but again repeated the rule as laid down in Shanks v. D. L. & W. R. R. Co., supra.

The particular operation which the switching crew (of which the deceased was one) had been ordered to do was to switch the team tracks, which, it is apparent, particularly means that they should switch the cars upon team track #3. This meant that the cars which had been carded or tagged "Pull" should be taken out from other cars and these other cars left upon the track. The conductor says that he had no list of the cars to be taken out, but he thinks that there were eight such standing near the east end of the track at the time the crew took the engine in to perform this work. The undisputed evidence shows that there were twenty cars standing on track #3 at that time. These twenty cars were coupled together, and in the beginning of the operation the most easterly car was cut off and the engine tied to the other nineteen and these nineteen cars pulled back towards the west.

Plaintiff says that this work of clearing team track #3 of empty cars which had been marked "Pull" made room for certain other loaded interstate cars, namely, #42012 and #119756, which were placed on this track after the empty cars were removed between the hours of 11:30 p. m. June 24th, and 7 a. m. June 25th. It is true that the record book shows that on the morning of the 24th

there were only eighteen cars, not including these two, upon track #3, while the same record for June 25th shows that these two cars were on the track at that time. This evidence is consistent with the theory that these two interstate cars were put upon team track #3 after 7:00 on the morning of the 24th, as defendant contends; but in either case the facts would justify a finding by the jury that the switching movement was so related to these cars as to make the movement practically a part of interstate commerce.

The evidence also tends to show that the Transcontinental Freight Company was engaged in a general freight forwarding business, consolidating less than carload shipments into carloads; that it had a warehouse located at 16th and Jefferson streets on defendant railroad, and that in shipping their freight it used the railroad cars of the defendant company. One of the empty cars which stood upon track #3 on the morning of the 24th, and at the time the switching movement in question began, was #42035. This was a car which had come in to Chicago from Keokuk, Iowa, on June 17, 1925. The evidence shows that this empty car, with two other empties, in response to an order of the Transcontinental Freight Company made on the morning of June 24th, was delivered at 4:10 a. m. on the morning of June 25th; that all three of these cars were loaded with merchandise and sent out of the State. Car #42035 was loaded at the freight house of the Transcontinental Freight Company at 3:30 p. m., and it left Chicago on the following day with a load consigned to Los Angeles, California. In view of all the facts with reference to this car, we think the jury might properly infer (and indeed that it could not properly infer anything else) that it was a car which at the beginning of the switching movement was assigned to interstate commerce.

The defendant does not seriously contend that this is

not true, but argues that the proof tends to show that this car #42035 was one of the cars that, prior to the time the deceased met his injury, had been cut off and switched in on track #6. Defendant says that after it was so put in, the switching crew had nothing more to do with it and that, so far as this crew was concerned, their connection with the movement of the cars towards the Transcontinental Freight Company had been ended before the accident happened.

There might be some merit in this and other contentions if we could divide up into its constituent parts the service which the deceased and the switching crew were performing at this particular time, but the order to switch the tracks was an entirety and the duty imposed upon the crew to render an entire service, which had not been finished at the time the deceased received his injury. As was said in Erie R. R. Co. v. Seary, *supra*, "The distinctions are too artificial for acceptance." Pennsylvania R. R. Co. v. Morrison, 3 Fed. 986; B. & O. R. R. Co. v. Darling, 3 Fed. 987; C. & A. R. R. Co. v. Industrial Commission, 288 Ill. 610.

Another car among the number which was being moved at the time the deceased received his injury was C. of Ga. car #7271. This car came into Chicago on June 17, 1925, from Paducah, Ky., and was loaded with an interstate shipment at that time, but was empty at the time it was being switched. The record indicates that it was not on team track #3 on the morning of June 25th following the accident, and a subpoena duces tecum was served upon the proper employee calling for the documents which would show the interyard movements of this particular car; but these, if they existed, were not produced.

The evidence tended to show that sometimes two or three days' time was necessary in order to load a car, and it

further appears that on June 27th this car was on one of defendant's tracks loaded with merchandise, of which a part was consigned to Florida; and further, that the car was started by defendant on its journey from Chicago to Florida on June 27th. The records also fail to disclose further movements of the nineteenth car after it was uncoupled and placed temporarily on #8 lead. The subpoena likewise called for the production of data and the record concerning this record.

It is a general rule that the failure of a party to produce evidence which is peculiarly and particularly within his power to produce, raises a presumption that the evidence, if produced, would be unfavorable to the party failing to produce it. The defendant contends that it did produce all available records, and further, that the rule stated is not applicable here because the defendant introduced no evidence. Condon v. Schoenfeld, 214 Ill. 226, is cited to this point. McDuffee's Adm'x v. Boston etc. R. Co., 81 Vermont, 52, is another case which states the same exception to the general rule under circumstances quite similar to those appearing in Condon v. Schoenfeld, supra. It is doubtful whether the presumption arising in such a case is of such a nature as to sustain a finding as upon independent evidence. On the other hand, the rule seems to be applied in such a way as to strengthen a prima facie case already established by the evidence. Of course, if a prima facie case has not been made, it is impossible to strengthen that which does not have existence. That was the situation which appeared in Condon v. Schoenfeld, supra. It is not the technical fact that the party does not call a witness that makes the rule of the presumption applicable, but rather the state of the evidence as presented by the whole record. There are many respects in which the record in this case can be

easily distinguished from the record in the case upon which defendant relies; but the main point is, it seems to us, that a prima facie case is here made to appear without resorting to presumption. We find it exceedingly difficult in reviewing this evidence to believe that it was not within the power of the defendant railroad company to produce evidence which would have definitely shown that no one of the cars in this group which were switched was being moved in interstate commerce, if such had been the fact. The record shows that the principal occurrence witness had not talked with the attorney for the plaintiff prior to the time he was called as a witness; that he, the witness, was an employee of defendant, and that upon cross-examination he did not appear to be unfriendly to the defendant. In a substantial way, therefore, we think it cannot be said that the defendant offered no evidence, although from a merely technical standpoint such appears to be the fact.

Another of the empty cars which were being handled by the switching crew in this movement was #13844, a foreign car which belonged to the Soo Line. The proof shows it arrived in Chicago on June 20th from Michigan loaded with interstate freight. It also appears that this same car was delivered empty to the Soo Line on June 26th at Chicago. There is also evidence in the record tending to show that the defendant at all times endeavored to keep cars in use for the purpose of saving demurrage or per diem charges. The defendant contends, however, on the authority of Philadelphia & R.R. Co. v. Cannon, 296 Fed. 302, that the mere delivery of this car to the Soo Line on June 26th raises no inference that it was engaged in an interstate movement while empty on June 24th. In Philadelphia & R.R. Co. v. Cannon, supra, as the opinion states, there was very little testimony upon the point at issue. The cars involved were apparently owned by a Maryland railroad company, and the evidence showed that they were

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in Pennsylvania, and from this bare fact it was presumed that the cars were brought from Maryland into Pennsylvania on an errand of interstate commerce. It was also presumed that because the cars were empty, they had arrived at their destination; the record was silent as to whether after that time they had been used in interstate commerce. There was no attempt there, as here, to prove the actual purpose of the particular movement of the cars at the time the deceased was injured. There is unquestioned proof of the interstate character of the use to which this car was put at the time of its arrival in Chicago. An unsuccessful attempt was made to prove what its different movements were after being unloaded, knowledge of which, it is fair to presume as we have already stated, was in the possession of the defendant. The fair inference from all the testimony is that the interstate character of the service to which the car was put continued from the time of its arrival in Chicago until its delivery to the owner for the purpose of being returned empty to a point outside of the State. These facts would seem to justify a finding that, contrary to the general rule, the delivery of this car at the point of destination did not end its character as an instrumentality of interstate commerce. (Johnson v. Southern Pac. R. R. Co., 196 U. S. 1; Johnson v. Great Northern R. Co., 178 Fed. 643; Trowbridge v. Kansas City & W. B. Ry., 179 S. W. 777.)

If any one of the cars connected with the movement which was being made at the time deceased was killed was being used in interstate commerce, then the movement in which the deceased was engaged must be regarded as of an interstate character. This record, we think, fairly establishes the fact that more than one of these cars was so used and that the switching movement was to the end of furthering that use. At any rate, we think under all the evidence that the movement was so closely connected with an interstate use

that practically it must be considered a part of, and in furtherance of, interstate commerce; in either case the finding for the plaintiff on that point was justified. (Devine v. C. R. I. & Pac. Ry. Co., 266 Ill. 248.)

The defendant further contends that the court erred in permitting the introduction of testimony as to the usual and customary method of doing switching work of this kind, which was practiced on other railroads. It says that the declaration in this case charged that a particular custom existed in the Morgan street yard of the defendant and that plaintiff having alleged that custom should have limited its proof to the case as alleged in the pleadings, citing Feder v. Midland Casualty Co., 316 Ill. 552. One count of the declaration alleged a custom in the Morgan street yard, but other counts charged negligent operation generally and negligence in operating at a high and dangerous rate of speed, etc. The evidence was admissible under these counts irrespective of the allegations in the other count. (C.R.I. & Pac. Ry. Co. v. Clark, 108 Ill. 113; C. & A. R. R. Co. v. Kelly, 127 Ill. 637; T. St. L. & E. C. R. R. Co. v. Bailey, 145 Ill. 159; Fowler v. Chicago Ry. Co., 285 Ill. 196; Davis v. E. C. R. R. Co., 294 Ill. 355; Adams v. C. C. C. & St. L. Ry. Co., 149 Ill. App. 574; Belcher v. Jno. M. Smythe Co., 243 Ill. App. 65; Canadian No. Ry. Co. v. Senske, 261 Fed. 537; Shannahan v. Empire Engineering Corp., 204 N. Y. 543; 98 N. E. 9; 44 L. R. A. (N.S.) 1135; Sturdyin v. Atlanta & G.A. L. Ry. Co., 82 S. E. 275.)

Moreover, the record shows that when this evidence was first offered defendant objected, whereupon the attorney for plaintiff modified the question, and that to the question as modified defendant did not object nor move to strike out the answer given in response to the question.

It is also urged that the damages awarded are excessive.

The evidence tended to show that the deceased was thirty-nine years of age at the time of his death, and his earnings averaged \$160 a month; that he left surviving him his widow, who is thirty-six years of age, two minor children, one aged four and the other ten years; that he was a good workman and a sober, prudent and industrious man who spent his earnings in properly caring and providing for his family. The jury apportioned the damages, giving to the widow \$15,000, to the little daughter \$9,000 and to the minor son \$8,500. This court has in numerous recent cases stated that it would take judicial notice of the depreciated value of the dollar. Molnamb v. McGee, 217 Ill. App. 272; Pesch v. Chicago Ry. Co., 221 Ill. App. 241; Bobieski v. City of Chicago, 230 Ill. App. 659; and ^{courts of} other States have in similar cases, where the economic loss shown was not greater than appears here, sustained judgments almost as large and in some cases larger than that rendered here. (Gulf C. & S. F. Ry. Co. v. Carpenter, 201 S. W. 270; St. Louis S. F. Ry. Co. v. Pearson, 221 S. W. 910; Texas & M. O. R. Co. v. Harrington, 241 S. W. 250; Baltimore & O. S. W. R. Co. v. Barnion, 195 Ind. 265; 145 N. E. 2; Louisville & N. R. Co. v. Holloway, 246 U.S. 525.)

This judgment is large, and in this class of cases there is constant danger that not juries alone but courts as well may be swayed by sympathy to the allowance of excessive damages. This judgment comes, in our opinion near but not quite to the point at which the court would be justified in substituting its own judgment for that of the jury and requiring a remittitur. However, upon a consideration of the whole record we conclude that we ought not to substitute our judgment for that of the jury.

The judgment is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

The evidence tends to show that the defendant was in the house at the time of the killing, and his behavior was such as to lead to the belief that he was the perpetrator of the crime. The evidence is circumstantial, but it is strong and convincing. The jury is the best judge of the facts, and it is their duty to reach a verdict on the basis of the evidence presented to them. The evidence is sufficient to support a verdict of guilty, and the jury should so find.

The evidence is as follows: The body of the victim was found in the house, and the defendant was found in the house at the time of the killing. The defendant was found with a bloody shirt, and there was blood on the floor of the house. The defendant was found with a knife in his hand, and the knife was found with blood on it. The defendant was found with a bloody shirt, and there was blood on the floor of the house. The defendant was found with a knife in his hand, and the knife was found with blood on it.

The evidence is sufficient to support a verdict of guilty, and the jury should so find. The evidence is as follows: The body of the victim was found in the house, and the defendant was found in the house at the time of the killing. The defendant was found with a bloody shirt, and there was blood on the floor of the house. The defendant was found with a knife in his hand, and the knife was found with blood on it.

KATIE G. SACK and BERNARD SACK,
Doing Business as SACK REALTY
COMPANY,

Defendants in Error,

vs.

JOSEPH D. STERN,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT

DELIVERED THE OPINION OF THE COURT.

This writ of error is brought by the defendant in the trial court, Joseph D. Stern, to reverse a judgment in favor of plaintiffs and against him in the sum of \$235.50, which was entered upon the verdict of a jury.

The statement of claim alleged that plaintiffs were duly licensed real estate brokers; that defendant was the owner of the property known as 1128 West 61st street; that he listed the same for sale with plaintiffs on March 1, 1924, agreeing to pay the sum of \$260 in case the plaintiffs procured a buyer; that plaintiffs submitted the property to one George H. Flowers who thereafter purchased the same.

The affidavit of merits denied that defendant listed the property with plaintiffs or promised to pay plaintiffs a commission or that plaintiff submitted the property to Flowers, who afterwards purchased it.

Upon the trial Mr. Krehin, an employee of plaintiffs, testified that defendant called him into his store one day and asked him to sell the property, saying that he wanted \$9,000 for it; that he, the witness, told defendant that he would try to do so; that he took Mr. Flowers and Mr. Sack up and showed them the building, but that Flowers said he wanted to get it cheaper and when urged to buy said he didn't care for the building because it was too dark. About

24-11-42

WILLIAM D. BROWN AND OTHERS - DEFENDANTS
v.
UNITED STATES OF AMERICA - PLAINTIFF

Indictment in Equity

vs.

JOHN L. BROWN, JR.
Plaintiff in Equity

WILLIAM D. BROWN AND OTHERS - DEFENDANTS

v.
UNITED STATES OF AMERICA - PLAINTIFF

WILLIAM D. BROWN AND OTHERS - DEFENDANTS

v.
UNITED STATES OF AMERICA - PLAINTIFF

THIS CASE IS SET FOR TRIAL AT THE COURT OF THE DISTRICT OF COLUMBIA

ON WEDNESDAY, JANUARY 14, 1942, AT 10:00 A.M. IN COURT NO. 10

OF THE DISTRICT OF COLUMBIA, IN THE CASE OF WILLIAM D. BROWN AND OTHERS - DEFENDANTS

v.
UNITED STATES OF AMERICA - PLAINTIFF

THE COURT HAS ORDERED THAT THE TRIAL BE OPENED AT 10:00 A.M. ON WEDNESDAY, JANUARY 14, 1942

AT THE COURT OF THE DISTRICT OF COLUMBIA, IN COURT NO. 10

IN THE CASE OF WILLIAM D. BROWN AND OTHERS - DEFENDANTS

v.
UNITED STATES OF AMERICA - PLAINTIFF

THE COURT HAS ORDERED THAT THE TRIAL BE OPENED AT 10:00 A.M. ON WEDNESDAY, JANUARY 14, 1942

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AT THE COURT OF THE DISTRICT OF COLUMBIA, IN COURT NO. 10

a week later Mr. Stern told him that the building had been sold to Mr. Flowers.

Bernard Sack, one of the plaintiffs, testified that the defendant listed the property in question with him for sale; that defendant was in his office when Mr. Krohin was present, and that he told defendant that he had a buyer for his property; that he tried to get defendant ^{to} come down on the price but defendant wanted \$9,000; that witness told him that he had an offer and if the party did not get the building for \$8,700 he would not take it. He says that he showed the building to Flowers, but there was a lady who would not let them in.

Mrs. Rubenstein testified that at the time in question she lived in the property sold; that Mr. Sack and Mr. Krohin came to her house but she would not let them in, telling them that the house was not in order; that on the next day Flowers, the purchaser, came back and asked where the owner lived and said that he wanted to buy the building, which she showed him.

Eatie G. Sack, in behalf of the plaintiff, testified that the sum of \$260 was a reasonable commission.

Flowers, the purchaser, a witness for the defendant, testified that Mr. Sack had shown him other buildings, but never the one in question; that other real estate brokers, namely, Mr. Wallace and Mr. Maloney, took him to the building, and that he first met the defendant Stern April 1, 1924, at Mr. Wallace's place; that no one else ever talked to him about the building; that he never talked to Mr. Krohin concerning the building; that Mr. Sack never sent him and his wife to the building with Mr. Krohin, but that on the day he was moving Krohin drove up to the door to show the building; that the witness said he had bought the building at 1138 West 61st street, and that Mr. Krohin said, "I could have sold you that building if I had known you wanted to pay that much." This witness denied that he had ever seen Mrs.

A week later Mr. Brown told him that the building had been sold to

Mr. Flowers.

Edward Smith, one of the plaintiffs, testified that
the defendant asked the property in question with him the week;
that defendant was in the office with Mr. Brown two weeks, and
that he told defendant that he had a paper for his property; that
he told to get defendant to come down on the paper for defendant
valued \$1,000; that witness told him that he had an offer and if
the party did not get the building for \$2,500 he would not take
it. He says that he showed the building to Flowers, but there was
a fact that was not true.

Mr. Brown testified that at the time he was
then and lived in the property and that he was not in the
case to the point of the trial and he was not in the
the case was not in effect; that at the time he was in the
court, some books and papers were shown to him and said that he
wanted to buy the building, which was shown him.

Walter G. Smith, in behalf of the plaintiffs, testified
that on the 1st of 1924 was a witness to the transaction.
Witness, the defendant, a witness for the defendant.

Testified that Mr. Smith had shown him some buildings, but never
was one in question; that other real estate brokers, namely, Mr.
William and Mr. Kellogg, took him to the building, and that he
found out the defendant from April 1, 1924, at Mr. Kellogg's
office; that no one else ever talked to him about the building;
that he never talked to Mr. Kellogg concerning the building; that
Mr. Smith never went him and his wife to the building with Mr.
Kellogg, but that on the day he was moving Kellogg drove up to the
door to see the building; that the witness said he had bought
the building at 1125 West 42nd Street, and that Mr. Kellogg said
"I could have sold you that building if I had known you wanted to
buy that house." This witness stated that he had never seen Mr.

Rubenstein until after he had purchased the building. He admits that he was at the office of Sack Realty Company, and says that the building at 1138 West 61st street was never mentioned to him, and that he learned that Mr. Stern was the owner of the building through Mr. Wallace, whom he had known for several years. He, however, did not know where the office of Mr. Wallace was. He says that he saw Mr. Sack in March at Mr. Sack's office prior to the time he purchased the building; that in March and April he was in his car, and that Mr. Sack showed him two buildings on Aberdeen street.

Mrs. Elinore Flowers, the wife of the purchaser, testified that she did not know either Mrs. Sack or Bernard Sack, but did know the salesman who worked in the office; that this salesman did not at any time show the premises at 1138 West 61st street; that she never had any conversation with Mr. Sack or Mr. Krohin concerning the purchase of the property, and that they never took her to see the building.

The defendant testified that he sold the premises to Flowers about April 12th or 14th, 1924; that Mr. Wallace brought Flowers to his office. He says that he did not at any time discuss the sale with Mr. Sack, Mrs. Sack, or Mr. Krohin; that he was in Mr. Sack's office once in January; that he listed the building for \$8250, but that Mr. Sack never took him to a client who was ready and willing to buy the building. He says that after the contract was signed Mr. Krohin asked him if he had sold the building and witness replied that he had sold it to Mr. Flowers. Mr. Krohin then said, "That is my customer," to which Mr. Flowers replied, "You never brought any customer to me." He received \$8350 for the building.

Under this evidence the question of whether plaintiffs' efforts were the procuring and efficient cause of the sale in question

...that he was of the office of Bank Building Company, and that the ...
...at 1133 West 12th Street and never mentioned to him, and ...
...that he learned that Mr. Brown was the owner of the building ...
...Mr. Brown, whom he had known for several years, at ...
...not have known the office of Mr. Brown. He was ...
...Mr. Brown in 1904, at Mr. Brown's office, and that he ...
...the building, that he knew and that he was in the ...
...that Brown was the owner of the building.

...The witness ...
...that he did not know it was ...
...that the witness was working in the office; that this ...
...not of any time when the premises at 1133 West 12th Street; that ...
...never had any conversation with Mr. Bank or Mr. Brown concerning ...
...the premises of the property, and that they never took him to see ...

...The witness testified that he sold the premises to ...
...Flowers about April 1904 or 1905; that Mr. Brown ...
...known to his office. He says that he did not at any time ...
...even the sale with Mr. Bank, or Mr. Brown; that he was ...
...in Mr. Bank's office once in January; that he listed the building ...
...the house, but that Mr. Bank never took him to a client who was ...
...ready and willing to buy the building. He says that after the ...
...first two signed Mr. Brown asked him if he had sold the building ...
...and witness replied that he had sold it to Mr. Brown, or ...
...then said, "That is my customer," to which Mr. Brown replied ...
..."You never brought my customer to me." He received \$5000 for the ...

...Under this evidence the question of whether ...
...witness were the procuring and efficient cause of the sale in question

was one of fact to be determined by the jury. There is evidence in the record tending to support the verdict which was returned, and indeed plaintiff in error does not argue that the verdict is manifestly against the weight of the evidence. After a careful perusal of it we are disposed to accept the verdict of the jury.

The judgment is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

KAROLINE SEIDEL et al.,
Defendants in Error,

vs.

MARGARET HOLCOMB et al.,
Plaintiffs in Error.

}
} ERROR TO CIRCUIT COURT
} OF COOK COUNTY.
}

MR. PRESIDING JUSTICE MATCHETT

DELIVERED THE OPINION OF THE COURT.

Margaret Holcomb and Lee Holcomb, two defendants in the cause below, sued out this writ of error to review a decree entered on January 19, 1927, foreclosing a trust deed and directing the sale of certain real estate. Several errors are assigned and argued, the merits of which we may not consider in view of the state of the record, from which we are wholly unable to determine that we have jurisdiction of all the parties to the record in the trial court.

The praecipe was filed in this court February 7, 1927. It names Caroline Seidel and Harold A. Fein individually and as trustee as defendants in error. It names as plaintiffs in error "Margaret Holcomb and Lee Holcomb et al." The scire facias also issued on February 7th describes the cause in the trial court as "Karoline Seidel and Harold A. Fein, individually and as trustee, complainants, and Margaret Holcomb and Lee Holcomb et al., defendants." The other parties to the record below were unknown owners and Charles E. Roland. It is apparent that it is impossible for us to determine whether one or more or all of these join in prosecuting the writ. It would seem clear, however, that if certain owners were unknown, they could not be properly joined as plaintiffs in error. Rule 10 of this court gives specific directions as to the proper practice in a proceeding of this kind and the steps necessary in order to bring all the parties to the record before this court. The

44-112

STATE OF NEW YORK
IN SENATE

JANUARY 12, 1937.
REPORT OF THE

COMMISSIONERS OF THE LAND OFFICE

RELATIVE TO THE LANDS OF THE STATE

REPORT OF THE COMMISSIONERS OF THE LAND OFFICE

The report of the Commission on the Lands of the State, made on this day of January, 1937, contains a list of the lands of the State, and a description of the same. The report also contains a list of the lands of the State, and a description of the same. The report also contains a list of the lands of the State, and a description of the same.

The report was filed in the court February 7, 1937.

It was reported that the Commission on the Lands of the State, made on this day of January, 1937, contains a list of the lands of the State, and a description of the same. The report also contains a list of the lands of the State, and a description of the same. The report also contains a list of the lands of the State, and a description of the same.

writ of error must agree with the record. (Cooke v. Cooke, 194 Ill. 225; Scott v. Great Western Coal Co., 220 Ill. 42; Clark v. Zaleski, 268 Ill. 427; Wells v. Murphy, 126 Ill. App. 103). The purpose of the rule is to avoid a multiplicity of suits. Any adjudication upon this writ of error without all of the parties to the record before the court would not be binding upon parties not before the court, and any of these would have the right to sue out another writ of error.

The writ of error will therefore be dismissed.

WRIT DISMISSED.

O'Connor and McSurely, JJ., concur.

... ..

PLATE 10

DOMENICO ALBERGO, also known as
DOMINICK ALBERGO,

Appellee,

vs.

CARLO GIGLIOTTI,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE KATCHETT

DELIVERED THE OPINION OF THE COURT.

The plaintiff, Albergo, sued the defendant, Gigliotti, in an action on contract.

The amended statement of claim alleged that plaintiff engaged defendant to perform legal services in connection with the return to this country of one Giacomo Nervielli, who had gone to Italy on a temporary visit and had been detained for military service and refused a passport for his return voyage; that it was agreed between the parties that plaintiff should pay defendant a deposit of \$100, which should be retained by defendant in payment of his services in case he procured the return of Nervielli to this country within a reasonable time, but that the deposit should be returned in full in case the defendant's efforts did not result in a return to this country of Nervielli within such time; that pursuant to said agreement plaintiff paid defendant the sum of \$100 and the defendant gave plaintiff a receipt written in the Italian language, setting forth in substance the agreement between the parties. An alleged correct translation of the receipt was made a part of the statement of claim, and it was further alleged that the efforts of the defendant did not result in a return to the United States of Nervielli within a reasonable time, but that he was still being detained in Italy; wherefore plaintiff demanded from defendant the return to him of the \$100 which the defendant had neglected and re-

fused to pay.

The defendant filed an affidavit of merits setting up, first, that plaintiff had acted as agent for Novielli and not in his own behalf, and had therefore no personal cause of action or interest in the subject matter of the suit; that if any liability existed it was to Novielli and not to the plaintiff; second, that the agreement in question had been brought about through misrepresentation and fraud on the part of the plaintiff, in that he had mis-stated the facts and conditions upon which the alleged agreement was based. These alleged misrepresentations were set out at length in the affidavit of merits and consist of written affidavits made by the plaintiff, Michael Luisi and Frank Orsini, as to the circumstances and conditions under which Novielli was detained in Italy.

The affidavit of merits further alleged that defendant was an experienced attorney of long standing, duly licensed to practice in all courts of this state and federal courts, including the Supreme Court of the United States; that he relied upon the misrepresentations made in the sworn statement of the plaintiff and others as to the facts in the case; that if the facts had been truthfully related to him, he would have declined the employment, Novielli would have saved his money, and the defendant his labors.

It was further alleged by defendant that the services rendered by the defendant at the request of the plaintiff were upon a quantum meruit basis and worth much more than the sum of \$100 paid to him.

Later, by leave of court, defendant filed a claim of set-off, setting up these same facts and alleging that, by reason of the false and incomplete statement made by plaintiff, defendant was compelled to render additional services which, together with the services already rendered, were reasonably worth \$150.

The plaintiff filed an affidavit of merits to de-

[illegible]

The opinion already rendered, were reasonably worth \$150. It was applied to render additional services which, together with the labor and materials necessary to complete the same, were estimated at the time of the contract at \$150.00, and the balance of the contract, by reason of the fact that the same had been completed, was estimated at \$150.00.

THE UNIVERSITY OF CHICAGO

fendant's claim of set-off, in which he denied that defendant was compelled to render any additional service because of any fraudulent statement made by plaintiff, and denied that he was liable as a matter of law for any such services.

The cause came on for hearing, the parties offered evidence tending to sustain their respective contentions, and at the close of all the evidence the court instructed the jury to render a verdict finding the issues against the defendant and assessing plaintiff's damages at the sum of \$100. The verdict was rendered, the motions of defendant for a new trial and in arrest of judgment over-ruled, and this appeal followed.

It is urged with other points that the court erred in directing a verdict in favor of the plaintiff. The rule of law to be applied upon a motion, at the close of all the evidence, to direct a verdict for plaintiff, is well settled in this State. The burden of proof is upon the plaintiff to establish his case by a preponderance of the evidence, and, if he has failed so to do, or if upon any material element of the plaintiff's cause of action there is any evidence from which a jury could reasonably find for the defendant, or if there is any evidence from which a jury could reasonably find that the defense set up by the defendant has been established, it is error to give such an instruction. (McGregor v. Reid Murdoch & Co., 178 Ill. 464; Libby, McNeill & Libby v. Cook, 222 Ill. 206; Davine v. Delano, 272 Ill. 166; Kelly v. Chicago City Ry. Co., 283 Ill. 640.)

Suit here was filed July 26, 1926. The last payment of money which the plaintiff seeks to recover was made on January 25, 1925, and the written receipt in evidence, upon which plaintiff relies was made and delivered on that date. It provided for the return of Novicelli within a reasonable time as a non-quota immigrant. In the first instance the burden was of course upon the plaintiff to show that a reasonable time had elapsed since the payment of the

...in which he denied that defendant was
compelled to render any additional services because of any threat
that defendant made by plaintiff, and denied that he was liable as
a matter of law for such services.

The same on her hearing, the parties offered
evidence tending to establish their respective positions, and at
the close of all the evidence the court instructed the jury to
return a verdict finding the issues against the defendant and
assessing plaintiff's damages at the sum of \$100. The verdict was
returned, the motion of defendant for a new trial and in arrest
of judgment overruled, and this appeal followed.

It is urged with great force that the court erred in
directing a verdict in favor of the plaintiff. The rule of law
to be applied was a matter of the state of all the evidence, in
directing a verdict for plaintiff, is well settled in this state.
The burden of proof is upon the defendant in establishing his case by
a preponderance of the evidence, and if he has failed to do so, it
is most certainly incumbent on the plaintiff to prove it. If
there is any evidence from which a jury could reasonably find for
the defendant, or if there is any evidence from which a jury could
reasonably find that the defense set up by the defendant has been
established, it is error to give such an instruction. (Ballinger v.
Ballinger, 201 Ill. 444; 128 Ill. 444; 128 Ill. 444; 128 Ill. 444.)

But here was filed July 20, 1920. The last payment
of money which the plaintiff seeks to recover was made on January
22, 1920, and the written receipt in evidence, upon which plaintiff
reliance was made and delivered on that date. It provided for the
return of \$100.00 within a reasonable time as a non-prosecuting
in the first instance the court was at liberty to find the plaintiff to
have lost a reasonable sum but cannot claim the payment of the

money, and that Novielli had not been returned. What was a reasonable time under all the circumstances would clearly appear to be a question of fact for the jury rather than of law for the court, and it was therefore error for the court to give this instruction.

As the judgment must be reversed for this reason, it will be unnecessary to discuss other alleged errors assigned and argued. As the cause, however, must be tried again, we think it should also be stated that the court proceeded upon an erroneous theory in excluding evidence of conversations of the parties with respect to material matters upon the theory that these would vary the written contract of January 25, 1925. This written document is set up in the pleadings and is in form a receipt for the money which plaintiff had paid to the defendant. It does not purport to contain the whole contract between the parties, and the general rule excluding evidence of oral conversations tending to vary the terms of a written contract between the parties was not applicable.

For the errors indicated the judgment will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

money, and this receipt has not been produced. That was a statement
given under all the circumstances which clearly appear to be a ques-
tion of fact in the jury's hands at the trial, and it
was therefore error for the court to give this instruction.

In the judgment must be reversed for this reason, it
will be unnecessary to discuss other alleged errors assigned and
argued. In the same, however, must be stated again, we think it
should also be noted that the court proceeded upon the erroneous
theory of excluding evidence of conversations of the parties with
persons in related matters upon the theory that there would only
be a partial contact of January 22, 1935. This witness document is
not up in the findings and is in form a receipt for the money which
Kleinert had paid on the defendant. It does not purport to contain
the whole content between the parties, and the court's ruling was
excluding evidence of such conversations tending to vary the facts of a
written contract between the parties was not applicable.

For the errors indicated the judgment will be reversed
and the court remanded the matter for trial.

REVEREND THE HONORABLE
JUDGE OF THE COURT, 11, 1935.

I. DOHNAL,
Appellee,
vs.
R. C. HORNE.
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Dohnal, the plaintiff, sued Horne, the defendant, alleging that through the negligence of the defendant the automobile of defendant collided with the automobile of plaintiff at the intersection of Diversey boulevard and Sheffield avenue, in the city of Chicago, on November 11, 1922, damaging the same to the amount of \$600. The defense was that the collision occurred without negligence on the part of defendant but as the direct result of the negligence of the plaintiff. There was a trial by the court with a finding that the defendant was guilty and damages fixed at \$508, for which sum judgment was entered in plaintiff's favor.

The plaintiff below has not appeared in this court to support the judgment. However, we have carefully examined the evidence, which is brief, and it leaves little doubt as to the material facts. The collision occurred about 7:30 o'clock p.m. Diversey boulevard is a public street which runs east and west and is about twenty feet wide. Sheffield avenue is a public street running north and south and is from forty to fifty feet wide. Two street car tracks lie in it, on one of which run north-bound cars and upon the other south-bound cars.

There are two safety isles or lamp posts in the middle of Diversey boulevard. One of these is situated on the

east side of Sheffield avenue, and the other near the intersection of the west sidewalk. The bases of the lamp posts are three or four feet high and two and a half to three feet wide, with big posts on top of these.

The neighborhood was a mixed residence and business district. The street was dry. The lamps were lighted on both cars, as it was getting dark. Quite a heavy traffic was moving west, a less heavy traffic to the east on Diversey boulevard. There were stores on the four corners of the intersection - a drug store on the northwest corner - and cars were parked parallel to the curb on the north side of Diversey boulevard just east and west of Sheffield avenue.

The testimony of defendant is to the effect that there was a car just north of him at the time the accident occurred which made it impossible for him to turn in that direction.

Just prior to the accident the plaintiff, Bohnal, was driving east on Diversey boulevard in his new Franklin sedan. He was going to the hospital. The defendant at this time was driving a new Hudson sedan west on Diversey boulevard at from twenty to twenty-two miles an hour. As he approached Sheffield avenue he slowed down to from ten to fifteen miles an hour. When plaintiff came to the west intersection of Sheffield avenue and Diversey boulevard he slowed down and made a turn north into Sheffield just as he came to the east line of the west lamp post in the center of Diversey boulevard. He started in a northeasterly direction, making a left-hand turn to go north on Sheffield and was at that time going at ten miles an hour. When he had proceeded from about twenty to twenty-five feet in a northeasterly direction to about the center of Sheffield avenue, his car struck the automobile of defendant which was traveling westward

and side of Sheffield Avenue, and the other near the intersection of the west sidewalk. The boxes of the lamp were on the west side of the street and were a half to three feet high, with the lights on top of them.

The defendant was a white male, about 35 years of age, 5 feet 10 inches tall, 150 pounds, with light brown hair, blue eyes, and a fair complexion. He was wearing a dark suit, a white shirt, and a dark tie. He was walking on the sidewalk on the west side of Sheffield Avenue, near the intersection of the street with the alley. He was walking in the direction of the alley, and was about 10 feet from the intersection when he saw the witness. He stopped and looked at the witness for a moment, and then he turned and walked away.

The defendant is a white male, about 35 years of age, 5 feet 10 inches tall, 150 pounds, with light brown hair, blue eyes, and a fair complexion. He was wearing a dark suit, a white shirt, and a dark tie. He was walking on the sidewalk on the west side of Sheffield Avenue, near the intersection of the street with the alley. He was walking in the direction of the alley, and was about 10 feet from the intersection when he saw the witness. He stopped and looked at the witness for a moment, and then he turned and walked away.

Just prior to the accident the defendant, Henry, was driving east on Broadway Boulevard in his car. He was going to the hospital. The defendant at that time was driving a 1924 Hudson sedan west on Broadway Boulevard at that time to about two miles an hour. As he approached Sheffield Avenue he slowed down to about ten to fifteen miles an hour. When he reached the west intersection of Sheffield Avenue and Broadway Boulevard he slowed down and made a turn south into Sheffield Avenue. He came to the east line of the west lamp post in the alley of Broadway Boulevard. He stopped in a north-south position, making a left-hand turn to go south on Sheffield Avenue. He was at that time going at ten miles an hour. When he had proceeded from about twenty to twenty-five feet in a north-south direction to about the corner of Sheffield Avenue, the car struck the sidewalk at the corner of Sheffield Avenue.

on Diversey boulevard.

It is apparent that the plaintiff either did not look or looking saw and decided to take his chance in cutting a corner by moving across the line of the west-bound boulevard traffic, and his negligence in so doing was the proximate cause of the collision. Plaintiff was therefore guilty of contributory negligence which bars his recovery; and as he cannot in any event recover, the judgment will be reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

O'Connor and McSurely, JJ., concur.

135 - 31745

FINDING OF FACTS.

We find as matters of fact that plaintiff, I. Dehnal, was guilty of negligence at the time and just prior to the accident on account of which he sues, which directly and proximately contributed to bringing about the injury for which damages are claimed by him in this suit, and that he is precluded by such contributory negligence from recovering in this cause.

STATIONER'S COPY

186 - 12707

THE FIRST OF THESE IS THE FACT THAT THE
COUNTRY IS NOT A SINGLE UNIT, BUT A
COMPLEX OF VARIOUS PARTS, EACH OF WHICH
HAS ITS OWN HISTORY AND CHARACTER.
THE SECOND IS THE FACT THAT THE
COUNTRY IS NOT A SINGLE UNIT, BUT A
COMPLEX OF VARIOUS PARTS, EACH OF WHICH
HAS ITS OWN HISTORY AND CHARACTER.
THE THIRD IS THE FACT THAT THE
COUNTRY IS NOT A SINGLE UNIT, BUT A
COMPLEX OF VARIOUS PARTS, EACH OF WHICH
HAS ITS OWN HISTORY AND CHARACTER.

A. E. BJORK,
Appellee,

vs.

FRANK WAIKASAS and MARY
WAIKASAS,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

In an action upon contract and upon trial by jury, there was a verdict for \$300 against both defendants, motions in behalf of both for a new trial and in arrest were over-ruled, there was judgment on the verdict, and from that judgment joint and several appeals were allowed.

The plaintiff below has not appeared in this court to support the judgment, and the defendants argue in the first place that there was no evidence tending to show a joint liability, and therefore, notwithstanding there was no plea denying such liability, there could be no recovery. Heidelsheimer v. Hecht, 145 Ill. App. 116; Imperial Hotel Company v. H. E. Claflin Company, 175 Ill. 119, and similar cases are cited.

The evidence tends to show that the defendants, Frank and Mary Waikasas, are husband and wife, and the joint owners of a piece of improved real estate, upon which the plaintiff, by written contracts with the husband, agreed to make certain repairs for a price named in these contracts; that the written contracts were signed by plaintiff and defendant by Frank Waikasas, but that the wife Mary was not a party to the contract, although the evidence tends to show that she knew the repairs were being made by the plaintiff and from time to time directed him as to the manner in which they should be made and directed that extra work be done.

By reason of differences between the parties the work,

however, was not completed, and plaintiff admits that a credit should be allowed for the work which was not done. It is not quite possible to ascertain definitely, either from the pleadings or the evidence, whether plaintiff claims the right to recover upon the written contracts or upon a quantum meruit. If it is conceded that the wife, Mary Waikasas, was liable on the quantum meruit, it would by no means follow that she was obligated to pay the price named in the written contract to which she was not a party; and there is no evidence in the record tending to show that she knew of the price agreed upon in the writings.

There is no evidence tending to show that the prices charged by plaintiff for the various items are customary and reasonable, and the court therefore erred in submitting that issue to the jury. For that reason the judgment must be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

CHARLES C. BELLANTE, Doing Business
as CHARLES C. BELLANTE AND COMPANY,
Appellee,

vs.

ANDREW JOHN SWANSON,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of \$600 entered upon the verdict of a jury.

The declaration in its several counts alleged that plaintiff was a duly licensed real estate broker, and that on March 17, 1926, he was employed by the defendant to negotiate a sale of certain premises, defendant agreeing that if plaintiff procured a purchaser, he, defendant, would pay for such services such commissions as were then established by the Chicago Real Estate Board for services of like character; that plaintiff secured such purchaser, who executed and delivered to defendant a written agreement to purchase the premises upon the terms named by the defendant; that defendant by a writing accepted the same, and that the charges, determined by the Real Estate Board for services of like character, amounted to \$600.

The defendant pleaded the general issue and special pleas.

The plaintiff having attached to his declaration an affidavit specifying the nature of his claim, the defendant filed an affidavit as to the nature of his defense, which was attached to the pleas filed, in which he states that prior to the execution of the contract between defendant and J. Christian Hossels and Lucina Hossels, covering the sale of defendant's building, he agreed with the plaintiff that \$600 should be paid to plaintiff as

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CHARLES E. MILLER, Sales Representative
of CHARLES E. MILLER AND COMPANY,
Attorneys.

APPEAR FROM MEMORANDUM
OF WORK COMPLETED.

IN
THE
COURT OF THE DISTRICT OF COLUMBIA

IN RE: WILLIAM J. MILLER

DECEASED, THE ESTATE OF

WILLIAM J. MILLER, DECEASED, BY HIS ESTATE

THIS IS AN ORDER OF THE COURT, made on a petition

in the case of WILLIAM J. MILLER, DECEASED, filed on a petition

for the appointment of an executor of the estate of WILLIAM J. MILLER, DECEASED, filed on a petition

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commission for his services in connection with the contract, provided the contract was fully consummated by purchasers; that the said contract was not fully consummated or performed by the said Roselles, but they on the contrary failed and refused to carry out the terms of the contract, and further denied that he agreed to pay commissions such as were established by the Chicago Real Estate Board for similar services.

The uncontradicted evidence tends to show that the plaintiff was a licensed real estate broker; that on March 17, 1926, he procured purchasers, who entered into a written contract with the defendant, which contract is in evidence; that the contract was prepared; that a \$500 deposit was paid to defendant by the purchaser at the time it was executed; that about a week later the purchaser paid defendant another \$400 as additional earnest money; that the real estate board commission would have been \$870, but at the time the contract was signed plaintiff agreed to reduce his commission to \$600; that the written contract contained a provision that the defendant was to hold the earnest money for the mutual benefit of the parties, and that if the purchaser should fail to perform his part of the contract, defendant might retain the earnest money, applying the same, first, to the payment of expenses incurred for vendor by his agent, and, second, to the payment to vendor's broker of a commission of \$600. The evidence fails to disclose why the deal did not go through, but it does affirmatively appear that the deposit made was retained by the defendant.

The testimony of the plaintiff was that the commission was to be paid when the contract was signed, and his testimony in this respect is corroborated by the written contract. The testimony of the defendant was that the commission was not^{to} be paid if the deal did not go through, and that the deal was not consummated.

commission for his services in connection with the contract, and that the contract was not fully consummated on payment of the cash. He also said that he was not necessary failed and refused to carry out the terms of the contract, and further denied that he agreed in any commission such as were established by the Ontario Real Estate Board for similar work.

The plaintiff's evidence tends to show that the defendant was a licensed real estate broker; that on March 17, 1912, he executed a contract, who entered into a written contract with the defendant, which contract is in evidence; that the contract was for a \$5000 deposit was paid to defendant by the plaintiff at the time it was executed; that about a week later the defendant paid defendant another \$500 as additional earnest money; that the real estate board commission would have been \$875, but at the time the contract was signed plaintiff agreed to waive his commission in full; that the contract was signed by plaintiff and defendant; that the commission is \$875; that the contract was signed by plaintiff and defendant; that the defendant was to hold the earnest money for the plaintiff's benefit of the parties, and that if the purchase should fail to purchase his part of the contract, defendant might retain the earnest money, which was paid, first, in the payment of the earnest money, and second, in the payment of the earnest money to the plaintiff's brother of a commission of \$500. The evidence tends to show that the defendant did not go through, but it does affirmatively appear that the deposit made was retained by the defendant.

The testimony of the plaintiff was that the contract was to be paid when the contract was signed, and his testimony in this respect is corroborated by the written contract. The testimony of the defendant was that the commission was not paid at the time the deal was not consummated, and that the deal was not consummated.

This question of fact was submitted to the jury, and there is nothing in the record from which we can find that the verdict of the jury is manifestly against the evidence. The judgment is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

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ROBERT H. HOLMES,
Appellant,

vs.

HARRISON & RIEDY, a
Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

In an action by plaintiff for attorney's fees, the defendant having pleaded payment and settlement and adjustment, a jury returned a verdict for the defendant on which the court, over-ruling motions for a new trial and in arrest, entered judgment.

The controlling questions in the case, raised by the assignments of error and argued, are whether the verdict of the jury is manifestly against the weight of the evidence, and whether for that reason the motion of plaintiff for a new trial should have been granted.

The evidence shows without contradiction that plaintiff, who is an attorney at law, had been employed by the defendant corporation in a number of legal matters, and that his services were satisfactory to them; in particular, that he had rendered legal services in connection with a partition suit to which the defendant had been made a party by its landlord; one Bright; that this suit was begun in September, 1923, and was dismissed in August, 1924. At that time the plaintiff rendered to defendant a bill for his services of \$1,050. The defendant made some complaint as to the amount of this fee and the matter was taken up in conference on September 12, 1924, and a statement, which is in evidence, in plaintiff's handwriting, shows that the charge was adjusted to \$700, on

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END - 1100

LEGAL AND MEDICAL

TO THE COURT

THE COURT
THE JURY
THE PROSECUTOR
THE DEFENSE

THE PROSECUTION'S CASE
THE DEFENSE'S CASE

The evidence presented by the prosecution is that the defendant was seen at the scene of the crime on the night of the murder. The defendant was seen with a person who was identified as the victim. The defendant was seen with the victim in a room which was described as being a private room. The defendant was seen with the victim in a room which was described as being a private room. The defendant was seen with the victim in a room which was described as being a private room.

The evidence presented by the defense is that the defendant was not at the scene of the crime on the night of the murder. The defendant was seen at a different location at the same time. The defendant was seen with a person who was identified as the victim. The defendant was seen with the victim in a room which was described as being a private room. The defendant was seen with the victim in a room which was described as being a private room. The defendant was seen with the victim in a room which was described as being a private room.

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The evidence presented by the defense is that the defendant was not at the scene of the crime on the night of the murder. The defendant was seen at a different location at the same time. The defendant was seen with a person who was identified as the victim. The defendant was seen with the victim in a room which was described as being a private room. The defendant was seen with the victim in a room which was described as being a private room. The defendant was seen with the victim in a room which was described as being a private room.

which at that time defendant made a cash payment of \$150, and thereafter from time to time made other payments.

On September 11, 1924, the defendant was served with an execution in another case brought by Bright and others in the Circuit court, being case No. B-112960. In this case it appears that Bright and others confessed judgment against Harrison and Reidy on a lease and an execution issued thereon for the sum of \$3,507.70. The plaintiff entered defendant's appearance in that suit, secured a trial upon the merits, and upon such trial in July, 1926, the suit was dismissed. It is for the value of services in defending this suit that plaintiff sues. No question is raised as to the reasonableness of the charge, the sole contention of defendant being that at the time of the adjustment on September 12, 1924, plaintiff agreed not only to reduce the bill which had been rendered for services earned up to that time to \$700, but also agreed to defend the other suit brought by Bright without further compensation. Mr. Harrison testified that at the time of this settlement with plaintiff the judgment by confession had been entered and that Holmes was to get only the fees in the partition suit because the lease upon which judgment was confessed covered the same premises involved in the partition suit. He says he, Reidy and the plaintiff had a conversation, and that plaintiff said, "He wanted to make settlement of \$1,050 for the entire case; told me he would agree to handle case for \$1,050 that had been running for some time and was not finally disposed of until July this year. That was agreed with Mr. Holmes at that time, \$1,050.*** There was settlement of \$1,050 on the case at that time."

Mr. Reidy testified that in this conversation plaintiff said he wanted more money, and that he, the witness, told him that he, Holmes, had drawn a lot of money, and it seemed he was getting too much money; that the witness told plaintiff there would be some

and it had been determined that a cash payment of \$100,000, and
 transferred from him to him and other persons.
 On September 11, 1934, the defendant was seated with
 an examination in another case brought by Wright and others in the
 District Court, United States District Court, District of Columbia.
 That being the case, the defendant was seated with
 him as a party and as counsel in the case. The case was
 brought by the defendant against the plaintiff in that
 case, brought a bill for the same, and was held in
 1934, 1935, the case was dismissed. It is not the case in the
 in the case and that plaintiff was. In the case in the
 as to the termination of the case, the case continued to be
 taken being that at the time of the judgment on September 11,
 1934, plaintiff agreed not only to return the bill which had been
 returned for payment under up to that time to \$100,000, but also
 agreed to return the same with interest by plaintiff within ninety
 days. The defendant was not to be paid by the plaintiff.
 and it is stated in the judgment by the court that the
 plaintiff had not taken any step to pay the bill in the plaintiff
 will return the same with interest and plaintiff agreed
 the case was dismissed in the case. The case was
 taken and the plaintiff had a conversation, and then plaintiff said
 "The court is now sitting at 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 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litigation afterwards, and that plaintiff said, "That's all right, I will take care of that. This is all the money I will want for the whole case. I will take care of the whole case for you for that much money. That was prior to the time judgment by confession was entered. They were then suing on partition suit. September 12, 1924, when Harrison spoke to Holmes about settlement of two cases I was in office, but didn't take any part in conversation that I know of." The witness further said that when plaintiff afterwards asked him for more money, he told him, "We had made a settlement because Harrison told me he made a settlement with Holmes and paid it. I don't remember what else was said. Something else was said but don't remember."

Plaintiff testified, on the contrary, that after the suit for partition was ended in August, 1924, he rendered a bill for services, and that on September 10th he and Riedy went over the bill, Riedy having complained that it was high. Plaintiff says, "I said, 'We'll make it \$1,050.' He said, 'How much have you received? \$350.' He said, 'Would you be willing to call it \$700?' I told him I would." Plaintiff said that he dropped into the office of Harrison and Riedy every other day; that he went to the office on September 11, 1924, and was told that they would have a check to apply on the \$700 September 12th, at which time they gave him a check for \$150; that Mr. Harrison walked over with an execution summons from the Circuit court in the second suit, and that Riedy asked, "What about this?" and that he, plaintiff, told Riedy he would look it up; that he attended Judge Swanson's court four days in the matter and procured an order; that Riedy asked what they were going to do about the case, and plaintiff told him that he wanted more money on the case, but Riedy said business was slack.

Plaintiff further says that Mr. Riedy came to the office to get ready for the trial of the case. Plaintiff told him

Plaintiff afterwards, and that plaintiff said, "That's all right, I will take care of that. This is all the money I will want for the whole case. I will take care of the whole case for you for that matter." That was prior to the time judgment by confession was entered. They were then suing on partition suit. September 18, 1934, when Harrison spoke to Holmes about settlement of two cases I was in office, but didn't take any part in conversation that I know of. The witness further said that when plaintiff afterwards asked him for more money, he told him, "We had made a settlement because Harrison told me he made a settlement with Holmes and paid it. I don't remember what else was said. Something else was said but I don't remember."

Plaintiff testified, on the contrary, that after the suit for partition was ended in August, 1934, he rendered a bill for services, and that on September 10th he and Riedy went over the bill, Riedy having complained that it was high. Plaintiff said, "I said, 'We'll make it \$1,000.' He said, 'How much have you received? \$300.' He said, 'Would you be willing to call it \$700?' I told him I would." Plaintiff said that he dropped into the office of Harrison and Riedy every other day; that he went to the office on September 11, 1934, and was told that they would have a check to apply on the \$700 September 12th, at which time they gave him a check for \$150; that Mr. Harrison walked over with an express summons from the Circuit Court in the second suit, and that Riedy asked, "What about this?" and that he, plaintiff, told Riedy he would look it up; that he attended Judge Swanson's court four days in the matter and procured an order; that Riedy asked what they were going to do about the case, and plaintiff told him that he wanted more money on the case, but Riedy said business was ahead. Plaintiff further says that Mr. Riedy came to the office to get ready for the trial of the case. Plaintiff told him

that he was going to withdraw because he wanted his fees, but Riedy said, "Don't drop case now, we have always gotten along; we won't get into a squabble;" that he went ahead with the case; that a day or two after the suit was dismissed he told Mr. Harrison the bill was \$450; that he said he would pay it but didn't have any money. He denies that he ever said he would take care of the suit for nothing, and says that when they agreed on the balance of \$700 he did not know about the confession of judgment.

Raymond F. Clark, employed in the office of plaintiff, says that when Riedy came to the office to talk about the case Holmes told him that he would withdraw unless his fees were paid, and that Riedy said that whenever the suit was over he would pay for it, and that plaintiff said he would go ahead on that basis. This conversation was, however, denied by Riedy.

In short the evidence, so far as the oral agreement is concerned, seems to be the word of Holmes and Clark as against that of Harrison and Riedy. On April 15, 1926, the defendant, by Mr. Harrison, wrote the plaintiff in part as follows:

"Upon checking over our books yesterday we find that we have paid you \$1117.50 on the Bright case and your written statement states that we were to pay you \$700.00.***

"Regardless of all of the above, we do not feel that you are taking the right attitude now regarding the Bright case, and there is no reason why we should change attorneys, but what we would like to do is to get together-- yourself, Mr. Riedy and the writer, and talk the matter over, and let us arrive at an understanding."

There being no question as to the performance of the services by plaintiff as alleged nor question as to the reasonableness of his charge, the burden of proof was upon the defendant to show a valid agreement to the effect that the legal services required in both suits would be rendered for the sum of \$1000. It seems hardly reasonable, under all the circumstances, to suppose that an attorney would make such an agreement at a time when he

There being no question as to the genuineness of the evidence by plaintiff as alleged and question as to the genuineness of his charges, the burden of proof was upon the defendant to show a valid agreement in the contract that the defendant was to be paid in full in advance. The defendant failed to do so and the court found in favor of the plaintiff.

could not have anything like definite knowledge as to the amount or character of the services that might be required. If the agreement was in fact as the witnesses for defendant state, it also seems strange that while a memorandum of the settlement was being made in writing, this agreement was not included.

The contention of the defendant is also, in our opinion, rendered more improbable by the fact that in defendant's letter of April 15, 1926, there is no assertion of any such agreement. It is difficult to believe that, if such an agreement was known to the writer of this letter, it would not have been definitely stated therein.

Considering, therefore, that the burden of proof was on defendant, the divergence of the testimony as to the oral conversations, that the defense is inconsistent with the only written evidence which appears in the case, and further, that such an agreement as defendant alleges would be unusual and unreasonable, we think the motion for a new trial should have been allowed and the case submitted to another jury.

For this error the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

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CHARLES SINCERE et al.,
Appellees,

vs.

B. A. CIESLUK,
Appellant.

}
} APPEAL FROM THE MUNICIPAL COURT
} OF CHICAGO.
}

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment in the sum of \$626.50 entered upon the finding of the court.

The statement of claim duly verified alleges that on July 22, 1926, plaintiffs, at the request of defendant, purchased for defendant 100 shares of Hudson Motors stock for \$6,642.50; that plaintiffs then and there requested defendant to reimburse them for said sum; that although plaintiffs repeatedly made said request, defendant failed to reimburse them; that plaintiffs thereupon notified defendant that they would sell said shares of stock for defendant's account unless he immediately reimbursed plaintiffs; that defendant ignored said notice; that on July 26, 1926, in accordance with the rules of the Chicago Stock Exchange and customs of the stock brokerage business, plaintiffs sold said 100 shares of Hudson Motors stock for account of defendant for the total sum of \$6,016; that plaintiffs were a brokerage firm in the City of Chicago, Cook County, Illinois, as defendant knew, and that the transactions mentioned were conducted in accordance with the rules and customs of the said business. The statement of claim also alleged an account stated between plaintiffs and defendant for said sum on July 31, 1926.

The affidavit of merits of the defendant alleges that upon the solicitation of plaintiffs he verbally offered to purchase the shares in question at the price of \$66.25 a share, pro-

244-1-688

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK In re:	JAMES J. COUGHLIN Defendant
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IN RE: JAMES J. COUGHLIN
 Defendant in the above entitled case.

Plaintiff alleges from a statement in the New York Times dated July 21, 1936, that the defendant, James J. Coughlin, at the request of defendant, purchased for defendant 100 shares of Hudson Motor Stock for \$5,000.00; that defendant then and there requested defendant to reimburse them for the same; that although defendant reportedly made such reimbursement, defendant failed to reimburse them; that defendant thereupon notified defendant that they would not reimburse at such time as defendant's account with the American Stock Exchange and City of Chicago, Cook County, Illinois, no defendant knew, and that the transactions mentioned were conducted in accordance with the rules and customs of the said business. The statement of said also alleged an account stated between plaintiff and defendant for said sum on July 21, 1936.

The efforts of months of the defendant alleged and upon the solicitation of plaintiff's no verbally offered to pay - where the shares in question at the price of \$50.00 a share, pro-

vided the plaintiffs would agree that a marginal payment of \$1,000 on account of such purchase could be made by the defendant upon the procurement of certain funds on July 28, 1926, and that the balance of the purchase price would not be required of the defendant; that said shares would be held by the plaintiffs until the defendant should order the sale of said shares; that thereafter plaintiffs advised defendant they had 100 shares of the stock; that on July 26, 1926, in violation of said agreement, plaintiffs, well knowing defendant had not theretofore secured the said certain funds as above mentioned, notified defendant that they had sold the said 100 shares claimed to be held for the account of defendant, and that said sale, if made, was in violation of the agreement and was a sale by plaintiffs of their own stock at their own risk and loss.

Other defenses set up by defendant in his affidavit of merits were to the effect that the transaction was illegal and void because a gambling transaction, and further that the action was barred by the Statute of Frauds. These two defenses, however, are not urged in the brief and will therefore be regarded as abandoned.

The defendant contends that the finding and judgment are against the weight of the evidence. There is a conflict in the evidence as to what were the terms of the actual contract entered into on July 21, 1926, the evidence for the defendant being to the effect that Mr. Weber, who was employed by the plaintiff brokers, stated to defendant that the Hudson Motors stock was likely to advance in price and asked defendant to get him an order to buy 100 shares on margin; that defendant told Weber that he did not have the ready cash to put down, but said, "If you want to buy it I can let you have the money later, whatever the required margin is." He said, 'All right; your word ought to be good for that. I will buy you a hundred shares of Hudson Motors at the market.' I

...the plaintiff's words were that a monetary payment of \$1,000
on account of such purchase could be made by the defendant upon
the payment of certain funds on July 22, 1932, and that the
balance of the purchase price would not be required at the de-
fendant; that said shares would be held by the plaintiff until
the defendant should order the sale of said shares; that there-
after plaintiff advised defendant they had 100 shares of the stock; that
on July 22, 1932, in violation of said agreement, plaintiff, well
knowing defendant had not theretofore received the said certain
funds as above mentioned, notified defendant that they had sold the
said 100 shares claimed to be held for the account of defendant,
and that said sale, it made, was in violation of the agreement and
was a sale by plaintiff of their own stock at their own risk and
loss.

Other defenses set up by defendant in his affidavit of
defense were to the effect that the transaction was illegal and void
because a gambling transaction, and further that the action was
 barred by the Statute of Limitations. These two defenses, however, etc.
not urged in the plea and will therefore be regarded as abandoned.
The defendant contends that the finding and judgment
are against the weight of the evidence. There is a confliction
the evidence as to what were the terms of the actual contract en-
tered into on July 22, 1932, the evidence for the defendant being
to the effect that Mr. Weber, who was employed by the plaintiff
therefore, stated to defendant that the Hanson Motors stock was
likely to advance in price and asked defendant to get him an order
to buy 100 shares on margin; that defendant told Weber that he did
not have the ready cash to pay down, but said, "All you want to buy
is I can let you have the money later, whatever the required margin
is." He said, "All right; your word ought to be good for that. I
will buy you a hundred shares of Hanson Motors at the market." I

said, 'All right, buy it at the market and as I say, I will give you the money as soon as I can, possibly this week or next week.'

Defendant also testified that on Friday, the 24th, Mr. Weber informed him that Mr. Ben Sincere had found out that the stock was bought for his account, and had said, "He told me that as long as it is Ciesluk he is good for it." He says that there were numerous conversations by telephone, and that defendant told plaintiff's that as soon as he had the ready cash he would send the check. Mr. Weber on the contrary testified that on July 21st defendant called him on the 'phone and asked how the market was and asked, "How is Hudson?" that the witness gave him the quotation, and defendant asked witness what he thought of it, and witness said, "I think it is a buy here." He says, 'All right, buy me a hundred shares. I cannot give you the check today, I will give it to you tomorrow.' I says that will be all right, I will put the order right in." The witness says that the order was thereupon entered, and that when the report came back from New York he called defendant up and told him that plaintiff had bought at 66½, and defendant replied, "All right, I will see you tomorrow."

Weber further testifies that next morning defendant called him from Wheaton that the market had declined a little; that defendant said he would not be in town until later in the afternoon, and that the witness told him plaintiff's would have to have a deposit on the account; that defendant asked that it might go until the next day, and that the witness told him to take care of it sure the next day; that defendant called the next day and said "I can't make that. I am at Wheaton again. I will take care of it." The witness says he pleaded with defendant, told him that he had put the witness in an embarrassing position; that plaintiff's always had to have a deposit; that the witness said that he had considered him a friend and did not think he would put him in the

position of not keeping his word; that defendant replied, "You just hold off another day, I will see you;" that the next day the same thing took place; that witness took the matter up with the firm and told them the condition of the account, and that they immediately sent defendant a letter, which is in evidence and is as follows:

"July 26, 1926.

Mr. B. A. Ciesluk,
Conway Bldg.
Chicago.

Dear Sir: On Thursday, July 22d, you gave our Mr. Weber an order to buy 100 shares Hudson, and upon his request for check you stated you would have check in our hands on Friday. This has not yet been received and unless we have your check for ample funds to take care of this transaction by 10:30 this morning, July 26th, we shall order the stock sold at the market and expect you to promptly reimburse us for whatever sum we have paid out on your order.

We cannot understand your delay in attending to a matter of this kind. You gave us this order unsolicited and we shall expect any loss which might occur on this transaction to be promptly paid, as otherwise we shall have to take other measures to collect same.

We have been trying to reach you by 'phone at your home and office since before 9 o'clock this morning, without success.
Yours truly,"

The same day plaintiff wrote defendant confirming a telephonic report of the sale of the shares at 60 3/8 for his account, enclosing a statement of the transaction. The defendant says that in the conversation with Mr. Charles Sincere on Monday, the 26th, Sincere told him that he would sell the stock and defendant would have to stand the loss; that he, defendant, said, "No, I don't stand any loss; if you sell it you are not selling it on my authority." This statement by defendant is denied by Mr. Sincere, and Weber testifies that he was in defendant's office at the time this telephone conversation took place, but there was nothing said by the defendant about standing the loss.

Under the Practice in the Municipal court a defendant is limited upon trial of the issues to such as are made up by the sworn pleadings, and all material averments alleged in the verified

petition of not keeping his word; that defendant was told, "You
just wait off another day, I will see you;" that the next day
the same thing was done; that witness took the matter up with the
firm and told them the condition of the account, and that they im-
mediately sent defendant a letter, which is in evidence and is so
colored:

"July 24, 1911.

Mr. W. A. Mendenhall,
Chicago, Ill.

Dear Sir: In answer to your letter of July 20, 1911, we
are sorry to say that we cannot do as you wish. We are
sorry you stated you would have been in our office at Chicago
this morning but your business was such that you could not
come. We are sorry to hear of your business and we hope
it will be soon over. We shall be glad to hear from you again
and expect you to promptly reimburse us for whatever sum we have
paid out on your order.
We cannot understand your delay in replying to a matter
of this kind. You gave us this order unqualified and we shall
expect my loss which might come on this transaction to be
promptly paid, or otherwise we shall have to take other means
to collect same.
It has been trying to reach you by phone as your name
and office address before a plain talk meaning, without success.
Yours truly,
J. W. Mendenhall

The same day plaintiff wrote defendant something to
celebrate receipt of the sale of the shares at \$20.00 per share no-
count, enclosing a statement of the transaction. The defendant
said that in the conversation with Mr. Charles Kinross on Monday
the 11th, Kinross told him that he would call this stock and the
defendant would have to stand the loss; that he, defendant, said,
"No, I don't stand my loss; if you will if you are not willing to
do so, I don't." This statement by defendant is denied by Mr.
Kinross, and Kinross testified that he was in defendant's office at
the time this telephone conversation took place, but there was
nothing said by the defendant about standing the loss.
Under the situation in the Kinross case a defendant
in limited amount of the interest to such as was made up by the
court's decision, and all matters connected with the parties

statement of claim not specifically denied are admitted. Madison v. Fortune Bros. Brewing Co., 163 Ill. App. 276; Redlig v. Looney, 208 Ill. App. 413, and see the opinion this day filed in Georger v. Anderson, general number 31846.

The only defense not abandoned which is set up in the affidavit of merits is that, according to the terms of the contract made between plaintiff and defendant, the marginal payment of \$1,000 by defendant was to be made on July 28th, and that the balance of the purchase price would not be required but that the shares would be held until defendant ordered the sale thereof; that the plaintiff sold the shares in violation of this agreement.

The finding of the court is against the defendant on this issue, and weighing the evidence, which we have recited, on the ground of reasonableness and probability, as well as the number of witnesses testifying to the facts, we think it cannot be said that the finding is against the weight of the evidence.

The defendant, however, argues that as a matter of law the plaintiffs assumed a legal liability of pledges of the stock, and that since the relationship of pledgor and pledgees existed between the parties, plaintiffs had a right to sell the stock only after a reasonable demand for the price and upon reasonable notice of the time and place of sale. The leading case of Markham v. Jaudon, 41 N. Y. 235, is cited and relied on, as well as Brewster v. VanLieu, 119 Ill. 554; Schaefer v. Dickinson, 141 Ill. App. 234, and other decisions of the Supreme and Appellate courts of this State. If we could regard this defense, as in this case, under the pleadings, it would not be difficult to distinguish the cases on the facts.

There is no evidence in the record tending to show that the stock was sold for less than its fair cash market value. The statement of claim avers that the sale was made in accordance with the rules of the Chicago Stock Exchange and the customs of the busi-

statement of the fact that the defendant was not a partner in the business of the Chicago Stock Exchange and the question of the value of the stock was not a matter of law.

The only person who was admitted to the stock in the defendant's name was the defendant himself.

It is true that the defendant was not a partner in the business of the Chicago Stock Exchange and the question of the value of the stock was not a matter of law. However, the defendant was not a partner in the business of the Chicago Stock Exchange and the question of the value of the stock was not a matter of law.

The defendant was not a partner in the business of the Chicago Stock Exchange and the question of the value of the stock was not a matter of law. The defendant was not a partner in the business of the Chicago Stock Exchange and the question of the value of the stock was not a matter of law.

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ness, and this averment is not denied. Neither, indeed, does the affidavit of merits deny the account stated as alleged. Under the circumstances disclosed by a preponderance of the evidence, plaintiffs were justified in selling the stock on the exchange, and the judgment is affirmed.

AFFIRMED.

O'Conner and Secarely, JJ., concur.

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ness, and this averment is not denied. Neither, indeed, does the affidavit of merits deny the account stated as alleged. Under the circumstances disclosed by a preponderance of the evidence, plaintiffs were justified in selling the stock on the exchange, and the judgment is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

and the interest in the subject, which, from the
effectiveness of the work, has become almost as general. The
the Commission is advised by a representative of the industry,
the Commission was further to bring the case to the attention,
and the interest in the subject.

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HANKEL PRINTING COMPANY,
a Corporation,
Appellant,

vs.

A. B. HESSER, HARRY L. BRIN
and WALTER H. WOOD,
Appellees.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MARCHETT
DELIVERED THE OPINION OF THE COURT.

This appeal is by plaintiff from a judgment in favor of defendants, entered upon a directed verdict, on motion of defendants at the close of the evidence for plaintiff.

There was a verified statement of claim alleging a written guaranty by defendants of payment in the amount of \$1500 for printing to be done at the request of one Cass. The statement set up items in detail and averred a balance due under the guaranty amounting to \$1397. There was an affidavit of merits in substance averring payments which it was claimed should have been applied upon the sum due under the guaranty. The only evidence submitted was that given in behalf of the plaintiff, and while these witnesses did not deny upon cross-examination that payments to the amount claimed had been made, they did (in a somewhat indefinite way) deny (and there is no proof in the record tending to show) that these payments should have been applied upon the amount due under the guaranty.

Defendants did not testify and have not appeared in this court to support the judgment. Under the pleadings the burden of proof was upon defendants to show payments which should have been applied upon the guaranty, and the evidence failing to establish this defense, it was error to instruct the jury upon

2451.A.634

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THE UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
DIVISION OF INVESTIGATION

This appeal is by plaintiff from a judgment in favor of defendant, entered upon a directed verdict, on motion of defendant, at the close of the evidence for plaintiff.

There was a verified statement of claim alleging a certain quantity by defendant of payment in the amount of \$1000 for printing to be done at the request of one Goss. The statement set up items in detail and stated a balance due from the plaintiff to Goss. It was verified by the plaintiff in writing.

Plaintiff's evidence which it was claimed should have been admitted upon the case under the guaranty. The only evidence submitted was that given in behalf of the plaintiff, and while there was no direct evidence upon cross-examination that payments to the amount claimed had been made, they did (in a somewhat indefinite way) deny (and there is no proof in the record tending to show) that these payments should have been applied upon the amount due under the guaranty.

Defendant did not testify and gave no answer in this court to support the judgment. Under the pleading the burden of proof was upon defendant to show payments which should have been applied upon the guaranty, and the evidence failing to establish this defense, it was error to instruct the jury upon

defendant's motion.

The judgment will therefore be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

1875

Source: U.S. Department of Commerce, Bureau of Economic Analysis.

• 1993-1994: 1993-1994

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EDWARD S. FOSTER and WILLIAM
W. TIRBITTS, Doing Business as
FOSTER & TIRBITTS,
Appellees.

vs.

JOHN A. CARROLL,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of \$521.75, entered upon the finding of the court, motions for a new trial and in arrest having been over-ruled.

The statement of claim alleged that plaintiffs, who were co-partners and painters and decorators, at the request of the defendant performed or cause to be performed services for the defendant during the months of June and July, 1926, on certain property occupied or controlled by him, aggregating the amount of \$519.07 and paid out for him for material to be used upon said property the additional sum of \$2.68, making a total sum of \$521.75.

The statement of claim further states that the claim is based on an account stated between plaintiffs and defendant, showing a balance of \$521.75 due and owing from the defendant to the plaintiffs on July 26, 1926.

Judgment was entered by default, which was afterwards set aside, and defendant filed an affidavit of merits which was stricken, whereupon he filed an amended affidavit of merits, in which he denied he was indebted to the plaintiffs in the sum claimed, or in any other amount, and alleged that he had paid the plaintiffs in full for all services performed and rendered by them, and further denied that there was any account stated between him and the plaintiffs in the amount of \$521.75, or in any other amount, on July 26, 1926, or on any other date.

2051.A. 684

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ATTEST: JOHN H. HARRIS, CLERK
OF THE COURT

RECEIVED AT THE COURT AND FILED
IN THE OFFICE OF THE CLERK
ON JULY 24, 1930
J. H. HARRIS, CLERK
BY: [Signature]

IN WITNESS WHEREOF, I HAVE HEREUNTO
SET MY HAND AND THE SEAL OF THE COURT

This is an appeal by the defendant from a judgment in
the sum of \$250.00, entered upon the finding of the court, rendered
on July 24, 1930, and is hereby brought before the court.
The statement of claim alleges that plaintiff, who
with co-defendants and partners and associates, at the request of the
defendant performed or caused to be performed services for the de-
fendant during the months of June and July, 1930, on certain spec-
ifics compiled or furnished by him, suggesting the amount of
\$250.00 and paid out for him for material to be used upon said
project, the additional sum of \$2.00, making a total sum of \$252.00.
The statement of claim further states that the claim is
based on an account stated between plaintiff and defendant, showing
a balance of \$252.00 due and owing from the defendant to the plain-
tiff on July 24, 1930.
Defendant was entered by default, which was afterwards
set aside, and defendant filed an affidavit of merits which was
affirmed, whereupon he filed an amended affidavit of merits, in which
he denied he was indebted to the plaintiff in the sum claimed, or
in any other amount, and alleged that he had paid the plaintiff in
full for all services performed and rendered by him, and further
alleged that there was no account stated between him and the plain-
tiff in the amount of \$252.00, or in any other amount, on July 24,

The cause was placed upon the call for trial on December 7th, at which time it was continued until the following day, when defendant by leave of court filed a statement of off-set, verified by his affidavit, in which he alleged that he was the owner of a certain eight-room house, barn and chicken house in Cook county, Illinois, which he desired to have painted and decorated; that he had entered into a verbal contract with the plaintiffs, by which he agreed to furnish the material and they to do the work of painting and decorating in a workmanlike manner, for the usual and ordinary charges made and paid for such work; that he furnished the material to the plaintiffs and that they did the painting and decorating; that he implicitly trusted to their honesty and in the rendering of bills for the said work; that he did not live on the farm or near the premises, but lived in the city of Chicago several miles removed from said premises, and did not visit or inspect the work, and had no means of knowing, except as bills were presented to him from time to time, anything about the cost of the work; that certain bills were presented to him, namely, one on June 4, 1926, for \$176.37, another bill on June 14, 1926, for \$636, and a third bill on June 27, 1926, for \$761.66, and relying upon the honesty of plaintiffs, he paid these; that the bill upon which plaintiffs sue was afterwards presented to him, and that he then made an investigation and found that the plaintiffs had grossly and fraudulently overcharged for their services, and that the bills rendered were fraudulent and dishonest; that a fair and reasonable and ordinary and just payment for all the work done by the plaintiffs on said premises, including material, was not more than \$1,200; that he paid for the material used on said job the sum of \$400 and the amounts above cited paid to the plaintiffs, making a total of \$1,974.03, which is an overpayment of \$774.03, and that this amount he was entitled to recover from the plaintiffs.

Plaintiffs filed an affidavit of merits to the counter-

claim, in which they admitted that defendant was the owner of the premises; that he entered into a contract with the plaintiffs to do the work of painting and decorating, but aver that the verbal contract, which was made on defendant's behalf by his superintendent and manager, John A. Berger, did not provide that plaintiffs should do the work for ordinary and usual charges, but that, on the contrary, the scale of prices and charges was expressly agreed upon between the parties; that plaintiffs did do a considerable amount of painting and decorating and rendered bills from time to time, approximately every week, setting forth in said bills the amount of time required in hours and charges per hour for such time, and included therein such, if any, amount as had been paid out by plaintiffs for and on behalf of the defendant; that defendant did not implicitly rely on the honesty or integrity of the plaintiffs in the performance of such work or in the rendering of said bills, but that he had ample opportunity to check up and verify from time to time all and each of said bills; that defendant often in person visited and inspected the work and had other agents besides his superintendent and manager who made inspection of the work; that the bills were rendered to the defendant by the plaintiffs from time to time promptly during the performance of their work down to June 25, 1926, and that on said date a bill was rendered for the amount of work that had been done to said date, aggregating approximately \$761.66; that on June 25, 1926, plaintiff William W. Tibbitts had a personal interview with the defendant concerning the amount then due and unpaid; that defendant was in possession of all of said unpaid bills and that Tibbitts requested of the defendant that he personally inspect the work that had been done; that defendant stated that he was satisfied not only with the bills rendered, but that he was well satisfied with the character of the work; that thereupon a check was given by the defendant to the plaintiffs for the amount which was then unpaid; that defendant made the request

again, in which they admitted that defendant was the owner of the
business; that defendant was a partner with the plaintiff in the
the firm of defendant and plaintiff, but that the plaintiff was
trust, which was made on defendant's behalf by his representative
and manager, John A. Barker, and that defendant was plaintiff's agent
in the firm for ordinary and usual charges, but that, in the con-
fidence, the scale of prices and charges was extremely high
between the parties; that plaintiff did so as a confidential agent
of defendant and defendant and defendant were in the same
relationship; every other, defendant's firm in and with the plaintiff
of the plaintiff in which the plaintiff was the owner, and
included therein such, if any, amount as had been paid and by
plaintiff for and on behalf of the defendant; that defendant did
not lawfully rely on the honesty or integrity of the plaintiff
in the performance of such work or in the rendering of such bills,
and that he had ample opportunity to check up and verify from time
to time all and each of said bills; that defendant often in person
visited and inspected the work and had other agents besides his
representative and manager who made inspections of the work; that
the bills were rendered to the defendant by the plaintiff's firm
and at the plaintiff's office during the performance of their work done
in New York, and that on said date a bill was rendered for the
amount of work that had been done to said date, representing approx-
imately \$701.66; that on June 28, 1936, plaintiff William W. Barker
had a personal interview with the defendant concerning the amount
then due and unpaid; that defendant was in possession of all of
said unpaid bills and that plaintiff requested of the defendant that
he personally inspect the work that had been done; that defendant
stated that he was satisfied not only with the bills rendered, but
that he was well satisfied with the character of the work; that
thereupon a check was given by the defendant to the plaintiff for
the amount then due and unpaid; that defendant made the payment

of Tibbitts that plaintiffs complete the work upon the same scale of charges shown in the bills previously rendered, and that defendant agreed that bills for the work yet to be done should be rendered promptly each week and paid promptly; that this was done by plaintiffs approximately every week, and that the defendant did not, prior to the commencement of this suit, deny the correctness thereof; that the bills were not fraudulent and dishonest; that plaintiffs did not overcharge; that the bills sued on were based upon the contract made on or about June 25, 1926, between Tibbitts on behalf of the plaintiffs, and the defendant, and that the rates of charges for the services to be rendered were then and there agreed upon between the defendant and the plaintiffs; that all the bills which have since been rendered were strictly in accordance with the agreement, and that all the bills previously rendered had been paid.

The affidavit further denied that the \$1200 was a reasonable and just payment for all the work done by the plaintiffs, and denied that defendant paid the plaintiffs the sum of \$400 for material, and denied that they had been overpaid the sum of \$774.03, or that there had been any overpayments, or that defendant had any claim or right to recover anything against the plaintiffs, but averred that there was still past due and unpaid the sum of \$321.75.

The parties offered evidence tending to sustain their respective contentions. Defendant was not present, he having, after the case was set for trial, left the city to attend a certain Deep Waterway convention at Washington, D. C. In his absence, however, an affidavit, made in his behalf by his counsel, was received in evidence, it being admitted that if defendant were present he would testify to the facts stated in the affidavit. At the close of all the evidence the attorney for the plaintiffs presented to the court written findings of fact and propositions

of the fact that the plaintiff's complaint was not made until after the death of the defendant, and that the plaintiff was not a party to the proceedings in the case. The court held that the plaintiff's complaint was not timely, and that the defendant was not liable for the death of the plaintiff. The court also held that the plaintiff was not entitled to damages for the death of the defendant.

The plaintiff's argument was that the defendant was liable for the death of the plaintiff. The court held that the defendant was not liable for the death of the plaintiff. The court also held that the plaintiff was not entitled to damages for the death of the defendant.

The court also held that the plaintiff was not entitled to damages for the death of the defendant. The court also held that the plaintiff was not entitled to damages for the death of the defendant. The court also held that the plaintiff was not entitled to damages for the death of the defendant.

of law which the court marked held, as follows:

That the plaintiffs, prior to June 25, 1926, performed the work and services for the defendant on his farm near Palos Park, Illinois, and for which said services the plaintiffs rendered bills to the defendant from time to time, which bills were paid by the defendant in full; that during and throughout the performance of the work by the plaintiffs prior to June 25, 1926, and after that date, the defendant made frequent visits to the farm property on which the work was being done, and not less than twice a week, and that upon such visits he did inspect, or had the opportunity to inspect, the work then being done by the plaintiffs; that on and after June 27, 1926, the plaintiffs, upon the express wish and request of the defendant, continued to do and perform work for him, defendant, upon the buildings on his farm property near Palos Park, Illinois, at a scale of prices agreed upon between the plaintiffs and the defendant, being the same scale of prices as that previously charged by the plaintiffs to the defendant; that plaintiffs continued to do and perform work for the defendant at said agreed scale of prices, and rendered bills every week to the defendant for the work so being done by them, and that upon the conclusion of the work by the plaintiffs they rendered duplicate bills to the defendant, and that down to the time of the commencement of this suit no complaint concerning such bills or the scale of charges therein was made by the defendant to the plaintiffs; that the defendant has failed to prove the charges in his cross-bill or claim of set-off that there was any fraud practiced toward him by the plaintiffs, and had failed to prove that the bills rendered by the plaintiffs were fraudulent and dishonest; that the said defendant was not entitled to any sum or amount upon his claim of set-off, but that he was indebted to the plaintiffs upon their bill rendered to the defendant since June 27, 1926, in the sum of \$521.75;

at law which the court would make, as follows:

That the plaintiff, prior to June 25, 1935, purchased

the said land and premises for the purpose of his own use and

use, and that the said land and premises were at that time

located in the defendant's township in the State of Ohio, and

the defendant in 1935, that being the year in which the

of the year by the plaintiff prior to June 25, 1935, and after

that date, the defendant made frequent visits to the land property

and while the work was being done, and not less than once a week,

and that upon such visits he did inspect, and had the opportunity

to inspect, the work then being done by the defendant; that on

and after June 27, 1935, the plaintiff, upon the evidence which was

presented at the hearing, admitted that he was not at the

defendant, upon the defendant's land, and that he was not

there, at a scale of evidence agreed upon between the parties;

and the defendant, being the owner of the land, and accordingly

admitted by the plaintiff to the defendant, that plaintiff was

located at the defendant's work for the defendant at said work;

and that all parties, and witnesses being every week to the defendant

for the work being done by them, and that upon the defendant

at the work by the plaintiff's land, and that the defendant

admitted, and that upon the date of the commencement of this

suit no complaint concerning work done or the scale of charges

shown was made by the defendant to the plaintiff; that the de-

fendant was failed to prove the charges in the complaint as shown

of record; that there was no record against the defendant by the

plaintiff, and that failed to prove that the bills rendered by the

plaintiff were reasonable and correct; that the said defendant

was not entitled to any sum of money upon the claim of record;

and that he was indebted to the plaintiff upon their bill;

and that the defendant since June 27, 1935, in the sum of \$100.00;

that a judgment should be entered in favor of the plaintiffs and against the defendant for said sum.

The only error assigned and argued is that the finding and judgment of the court was contrary to the manifest weight of the evidence. A careful examination of the record leaves us without doubt as to the merits of this controversy on that point. So far^{as} the claim of plaintiffs is concerned, the defendant was of course limited to the defenses set up in his affidavit of merits, and in those he simply denied the indebtedness generally, alleging that he had paid in full for all services rendered, and further denied that there was an account stated on July 26, 1926, or at any other date.

No evidence whatsoever was offered tending to show the payment of this claim. The evidence for plaintiffs tended to show that the work was done under a specific contract for a fixed compensation on a time basis; that bills were rendered to the defendant as requested by him; that these bills were correct and unpaid. This evidence stands uncontradicted, except by the affidavit of the defendant, made by his attorney, in which he says that the work was to be done for usual and ordinary charges made and paid for such work at said time. In other words, plaintiffs proved a specific contract at a definite price, while defendant's testimony would indicate that plaintiffs' claim, if any, should be on a quantum meruit basis. The finding of the court is with the plaintiffs on this controlling issue of fact, and that finding is sustained by the evidence of the plaintiff Tibbitts, who made the contract, and by the superintendent and manager of defendant's farm, Mr. Berger, with whom the contract was made. The bills rendered from time to time are also in evidence and tend to corroborate this testimony. The affidavit of defendant, by his attorney, while admitted by agreement, could not, in the absence

That a judgment should be entered in favor of the plaintiffs was
subject for discussion, but said was.

The jury must be guided and aided in that the finding
and judgment of the court was contrary to the weight of
the evidence. A careful examination of the record shows to which
of the two sides in the matter of this controversy on that point. We
find the weight of the evidence in favor of the defendants, the defendant was
shown limited to the defendant was up to his neck in the matter of making
and in cases he simply denied the indebtedness generally, alleging
that he had paid in full the all money received, and that
before that time was in payment stated on July 22, 1911, in the
and that date.

The evidence submitted for the jury to consider was the
evidence of this claim. The evidence for plaintiffs' claim is that
that the work was done under a specific contract for a fixed sum.
The evidence for the defense was that the bill was rendered for the balance
and is supported by him; that those bills were correct and unpaid.
This evidence stands uncontradicted, except by the testimony of
the defendant, made by his attorney, in which he says that the work
was to be done for usual and ordinary charges made and paid for
work with no fixed sum. In other words, plaintiffs' proof is that
this contract of a definite price, while defendant's testimony
was to the effect that plaintiffs' claim, if any, should be as a
matter of course. The finding of the court is with the plain-
tiffs on this controlling issue of fact, and that finding is sus-
tained by the evidence of the plaintiff's witnesses, who made the
contract, and by the representations and manner of defendant's
claim, Mr. Hargrett, when upon the contract was made. The bill
rendered from time to time was also in evidence and found to
corroborate this testimony. The affidavit of defendant, by his
attorney, while admitted by agreement, could not, in the absence

of the defendant, be subjected to the tests of cross-examination, and, therefore, as against the evidence for plaintiff's has little weight.

For the same reasons the court was justified in finding against defendant on his counter-claim. That, too, was based on the theory that the contract for the work was that it was to be done upon a quantum meruit basis, but the evidence, the weight of which we have already discussed, shows that this material allegation of the claim of off-set was disproved by a preponderance of the evidence, and the evidence of defendant's expert witnesses, Jares and Mace, becomes immaterial.

Much is said in the brief of defendant on the question of whether the evidence tends to show an account stated, but, even if we assume that no account was stated, plaintiffs were entitled to recover on the facts alleged and proved. Indeed, there is no evidence in the record, as we view it, from which fraud could be inferred.

The judgment is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

EDWARD S. FOSTER and WILLIAM
W. TIBBITS, Doing Business as
FOSTER & TIBBITS,
Appellees,

vs.

JOHN A. CARROLL,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of \$521.75, entered upon the finding of the court, motions for a new trial and in arrest having been over-ruled.

The statement of claim alleged that plaintiffs, who were co-partners and painters and decorators, at the request of the defendant performed or cause to be performed services for the defendant during the months of June and July, 1926, on certain property occupied or controlled by him, aggregating the amount of \$519.07 and paid out for him for material to be used upon said property the additional sum of \$2.68, making a total sum of \$521.75.

The statement of claim further states that the claim is based on an account stated between plaintiffs and defendant, showing a balance of \$521.75 due and owing from the defendant to the plaintiffs on July 26, 1926.

Judgment was entered by default, which was afterwards set aside, and defendant filed an affidavit of merits which was stricken, whereupon he filed an amended affidavit of merits, in which he denied he was indebted to the plaintiffs in the sum claimed, or in any other amount, and alleged that he had paid the plaintiffs in full for all services performed and rendered by them, and further denied that there was any account stated between him and the plaintiffs in the amount of \$521.75, or in any other amount, on July 26, 1926, or on any other date.

THE COURT OF APPEALS
IN THE DISTRICT OF COLUMBIA
FOR THE DISTRICT OF COLUMBIA

IN RE: THE ESTATE OF
JAMES M. HARRIS

APPEAL FROM THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA

THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA

IN RE: THE ESTATE OF JAMES M. HARRIS

This is an appeal by the defendant from a judgment in the sum of \$100.00, entered upon the finding of the court, rendered for a new trial and is argued having been overruled.

The statement of claim alleged that plaintiff was a partner in the business of defendant and defendant, at the request of the defendant, performed or caused to be performed services for the defendant during the months of June and July, 1930, on certain property owned or controlled by him, representing the amount of \$100.00 and paid out for him for material to be used upon said property the additional sum of \$2.50, making a total sum of \$102.50.

The statement of claim further stated that the claim is based on an account stated between plaintiff and defendant, showing a balance of \$102.50 due and owing from the defendant to the plaintiff on July 15, 1930.

Judgment was entered by defendant, which was affirmed.

Defendant, who had filed an affidavit of merits which was returned, whereupon he filed an amended affidavit of merits, in which he stated he was indebted to the plaintiff in the sum of \$100.00, or in any other amount, and alleged that he had paid the plaintiff in full for all services performed and rendered by them, and further stated that there was no account stated between him and the plaintiff in the amount of \$102.50, or in any other amount, on July 15, 1930, or on any other date.

A. I. GEIDEL,
Appellee,

vs.

JACOB LIEBERMAN, Doing Business
as Medinah Pharmacy,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of \$500, which was entered upon the finding of the court, motions of defendant for a new trial and in arrest of judgment having been over-ruled.

The amended statement of claim alleged that plaintiff on June 19, 1925, asked defendant for calomel powder, and that defendant substituted in lieu thereof and delivered to plaintiff bichloride of mercury powder, which defendant applied to a wound by reason whereof he was damaged.

The affidavit of merits alleged that the defendant prepared and filled all prescriptions as submitted and denied that he substituted bichloride of mercury for calomel powder in dealing with the plaintiff.

The evidence tends to show that on June 19, 1925, defendant conducted a pharmacy at the northeast corner of Jackson boulevard and Wells street in Chicago; that at that time plaintiff told defendant that he wished to get calomel powder; that Mr. Lieberman asked how much and plaintiff said, "Just enough for a dusting powder, a small package." Plaintiff testified that defendant went back to the prescription counter and fixed up a package which he produced. He says that the box was practically full and that he applied a part of it to his side for a dusting

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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This is an appeal by the defendant from a judgment in the sum of \$500, which was entered upon the finding in the case.

On June 17, 1968, James Earl Ray, was arrested at his home in London, England, and returned to the United States. He was charged with the murder of Dr. Martin Luther King, Jr. and is currently serving a 99-year sentence in the Missouri State Penitentiary.

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powder. The box received in evidence contained a white crystallized powder and was labeled -

"Calomel" (written in pencil.)
 Medinah Pharmacy
 Medinah Building
 Lieberman & Lieberman, R. Ph.
 Northeast Cor. Jackson Blvd. & Wells St.
 Chicago."

The plaintiff testified that there had originally been a wart on his side which the doctor took off, and that the doctor told him to get calomel powder for dusting powder; that the powder which he applied burned the wound, that it healed all right but is still very sensitive. The record shows that this wound was exhibited to the court; that the protrusion of the wound was not as great as one-half inch; that the blue part was about one-quarter inch wide, about one-half inch in a round circle, about two inches long, about one and one-half inches in diameter, and that the protrusion was about one-quarter of an inch. Plaintiff testified that the wound was very sensitive, especially to heat, but if he started to sweat it itched, which caused loss of sleep; that he was absent three days from work, and that the wound was treated by a Dr. J. E. Ross, to whose office he made nineteen visits; that he paid the doctor \$62.20, and also bought medicine for which he paid \$7.20; that he, plaintiff, earned about \$407 a month.

On cross-examination plaintiff testified that he applied the powder six times; that when he first applied it, it had no effect; that the wound at that time was dried up; that at that time the wound was about as large as a little pencil. Plaintiff admitted he received compensation for the time he stayed away from work.

Dr. Ross testified that he had known the plaintiff seventeen or eighteen years; that plaintiff called at his office on or about June 19, 1925, when a wart was giving him trouble, which he asked the witness to remove; that a few days thereafter

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The plaintiff testified that there had been a wound on his side which the doctor took off, and that the doctor told him to get salicyl powder for treating powder; that the powder which he applied around the wound, that it healed all right and as well very sensitive. The record shows that this wound was admitted to the court; that the prosecution of the wound was not as great as one-half inch; that the wound was about one-quarter inch wide, about one-half inch in a round circle, about two inches long, about one and one-half inches in diameter, and that the wound was about one-quarter of an inch. The plaintiff testified that the wound was very sensitive, especially to heat, but it is stated to wound it itched, which caused loss of sleep; that he was absent three days from work, and that the wound was treated by Dr. J. E. Rose, to whose office he made nineteen visits; that he paid the doctor \$25.00, and also bought medicine for which he paid \$7.50; that he, plaintiff, cannot show that a wound

On these occasions I usually felt that I was
 taking the powder in time; that when I first applied it, it had
 no effect; that the wound at that time was quite dry; that at that
 time the wound was about as large as a little pencil. Finally,

On or about June 19, 1957, when a war was giving him trouble, which he asked the witness to remove; that a few days later, on or about June 20, 1957, when a war was giving him trouble, fourteen or fifteen years; that "Uncle" called at his office or home sometime in 1957, when he had written the plaintiff.

plaintiff had a large area of inflamed tissue, very red and very sensitive; that he would say that no calomel was applied but that some irritant had been applied; that he saw plaintiff about twenty times thereafter and charged him three dollars a visit. He further testified that the powder produced was bichloride of mercury, judging by the looks of it and without making any tests; that it was not calomel powder; that if bichloride of mercury were to be applied to the wound it would corrode; that if there was no wound there it would corrode the skin and cause a raw surface; that the wound was not corroded after he removed the wart, but after the plaintiff came back to him it was, and plaintiff complained of feeling bad. He testified further that he had examined the wound and found a keloid growth which follows irritation of the skin, a form of scar tissue which becomes irritated and annoys by itching a great deal; that it cannot be cured very well; that it may disappear; that it may enlarge; that he tested the powder applied and told plaintiff that he believed it was bichloride of mercury and told him not to put any of it on, that it would only make it worse. Some of the powder was put in water upon the trial and Dr. Ross testified that bichloride of mercury dissolves in water while calomel will not dissolve at all. He states that this powder dissolves and that you can tell it is a corrosive sublimate by the taste of it. He swears positively that the powder in question is bichloride of mercury.

Dr. McDermott, called by the defendant, testified that he had been in practice for seven years; that he never applied bichloride of mercury to any part of the body; that he had never handled bichloride of mercury in powder form; that it was not used as a dusting powder; that it is a disinfectant and used to sterilize.

The defendant testified that he had been a druggist

[illegible]

for ten years; that he did not remember of having ever seen plaintiff before; that his handwriting appeared upon plaintiff's Exhibit 1 but he did not recall the occasion of giving it, nor could he state what it contained at the time. He states that calomel was given at that time; that the notation was placed on the box when it was dispensed; that he gave what was asked for and then put a notation on the box of what it contained; that this was all he could recall with reference to the transaction.

The defendant argues in this court that the evidence fails to show that the injuries complained ^{of} resulted from the application of the powder sold by the defendant and fails to establish the fact that the powder was bichloride of mercury, and that the judgment of the court below is excessive.

There is evidence in the record, which we have recited at length, from which the court could properly find the issues of fact for the plaintiff, and we are not able to say that the finding of the court is against the preponderance of the evidence. While the damages allowed seem large, in this connection also the court saw the wound and the witnesses, and we do not think that the damages allowed are so excessive as to justify a court of review in making a different finding.

The judgment is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

for the purpose of showing that the evidence is not reliable; that his handwriting appeared upon the receipt; that he did not recall the occasion of giving it, nor could he state what it contained at the time. He stated that it was given at that time; that the notation was placed on the box when it was delivered; that he gave what was asked for and then put a notation on the box of what it contained; that this was all he could recall with reference to the transaction.

The defendant argues in this court that the evidence fails to show that the intention was to establish the reliability of the powder sold by the defendant and fails to establish the fact that the powder was identical at various times and that the defendant of the court below is unavailing.

There is evidence in the record, which we have reviewed as to the fact that the court could properly find the same as to the reliability, and we are not able to say that the finding of the court is against the preponderance of the evidence. While the weight of the evidence is large, in this connection also the court has the fact and the witness, and we do not think that the same is likely to be so much as to justify a court of review in setting a different finding.

The judgment is therefore affirmed.

ATTORNEY.

W. J. H. and H. J. H., counsel.

JAMES T. DE VERE,
Appellee,

vs.

BRIDGET RABBIT,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment in the sum of \$300 entered upon the finding of the court. The statement of claim alleged that defendant employed plaintiff as solicitor in case No. B-119260, in the Circuit court of Cook county, entitled Rabbitt v. Rabbit; that he performed services as agreed, for which there was due the sum of \$300.

The affidavit of merits denies that defendant ever employed the plaintiff or that defendant is indebted to the plaintiff. The defendant contends that the court erroneously admitted certain evidence, but as the trial was by the court without a jury, this would not be reversible error, provided there is sufficient competent evidence in the record to sustain the finding. She also states that the alleged employment of defendant was within the Statute of Frauds, but her affidavit of merits does not set up this defense. It is elementary that the Statute of Frauds must be pleaded by the defendant desiring to have its benefits.

The controlling question in the case is whether the finding of the court is against the manifest preponderance of the evidence.

The evidence tends to show that Christina Rabbit brought suit for divorce in the Circuit court against her husband, Lester Rabbit, who is the son of the defendant, Bridget Rabbit;

that plaintiff, James T. DeVere, is an attorney at law, practicing at the Chicago bar, and that he entered his appearance in the case for Lester Rabbit on April 16, 1925; that thereafter he filed an answer to the bill of complaint and appeared for the defendant, Lester Rabbit, on many occasions, remaining his solicitor of record in the cause until a decree was entered on May 16, 1926.

It is conceded that the charge for DeVere's services is reasonable, the only question in the case being one of fact, namely, whether he was employed by the mother, Bridget Rabbit, and whether she, as he says but as she denies, promised to pay for the services to be performed. The defendant contends that since the burden of proof was upon the plaintiff and since the plaintiff is the only witness who testified to the alleged agreement by which defendant became responsible, while this is denied by the defendant, there could be no preponderance of the evidence in plaintiff's favor. Peaslee v. Glass, 61 Ill. 94; Brady v. Chaffee, 163 Ill. App. 242; Brougham v. Paul, 138 Ill. App. 455; Northern Trust Co. v. Parker, 205 Ill. App. 450, and Heide v. Schubert, 166 Ill. App. 586, are cited to this point. Those cases, however, must be considered in the light of the particular circumstances appearing in each case, and there are circumstances appearing in this record from which the court may well have concluded that the evidence of the plaintiff was the more reasonable and credible.

The evidence shows beyond a doubt that the defendant consulted with plaintiff about the suit, and she was financially interested in an automobile the title to which seems to have been in her son's (Lester's) name, but of which she claimed to be the real owner. Moreover, the evidence indicates that Lester was financially irresponsible, and it is unreasonable to believe that the plaintiff would have performed these services for him without the agreement with the mother to which the plaintiff testifies. The defendant ad-

recovered and exposed with their presence at 37

THE AT HOME ABOVE BEYOND A BRIDGE IN THE DISTANCE

[illegible]

nits she called him up with reference to the case and that at one time she told him that if he got the automobile she would pay what she thought was right. She says that some of her money was invested in the automobile in the first place and that she was going to pay Mr. DeVere for recovering the automobile, if he got the automobile, but nothing was ever said to her about any fee with reference to the divorce.

It also appears that prior to the employment of plaintiff, defendant advanced alimony in behalf of her son to the amount of \$50.

We cannot say that under all the evidence the finding of the court is manifestly against the preponderance of the evidence, and the judgment is therefore affirmed.

AFFIRMED.

McSurely, J., dissents.

O'Connor, J., specially concurring: I disagree with what might be considered an approval, in the opinion, of the proposition that where one witness testifies to a state of facts which is denied by another witness, a court of review must reverse because there is no preponderance. My opinion on this subject may be found in Mills & Co. v. Duke, 232 Ill. App. 277, and Byck v. Morris, 234 Ill. App. 649.

also he called him up with reference to the fact that he was not
and told him that it was not the automobile that would pay him the
largest sum of money. He says that some of her money was invested in
the automobile - the first place and that she was ready to pay it.
Before the testimony was taken, also, it was said that the automobile, and
Karlson was even said to have about any too with reference to the dis-
posal.

It also appears that prior to the completion of the
first, Karlson himself himself in behalf of her son to the amount
of \$100.

It would not seem that all the interest in the
of the same is actually against the Government at the time.
There, and the interest is actually against.

January, 1, 1914.

Witness, J. J. [illegible] [illegible] [illegible] [illegible] [illegible]
be considered as [illegible] in the [illegible] of the [illegible]
that [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
there is no [illegible] [illegible] [illegible] [illegible] [illegible]
Karlson is [illegible] [illegible] [illegible] [illegible] [illegible]
and [illegible] [illegible] [illegible] [illegible] [illegible]

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LEWIS H. FELDMAN,
Appellant,)

vs.

CHARLES A. BURKE and
MAE BURKE,
Appellees.)APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT

DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment in favor of the defendants entered upon the finding of the court.

The statement of claim alleges in substance that the defendants are indebted to the plaintiff in the sum of \$191.59, being the fair and reasonable price of the use and occupation by the defendants of premises known as 701 Home avenue, Oak Park, Illinois, for the period commencing April 6, 1926, and ending April 28, 1926. The statement of claim alleged demand for payment by plaintiff and refusal by defendants.

The facts in the case are not disputed. On March 4, 1926, defendants were the owners of the premises in question, and on that date entered into a real estate sales contract, whereby plaintiff agreed to purchase of the defendants the premises in question for the sum of \$18,500, subject to a first mortgage in the sum of \$8,000, the balance of \$10,500 to be paid in cash. With other provisions in the contract was the following clause: "Possession on or before May 1, 1926."

Pursuant to this contract the defendants executed and delivered to the plaintiff a warranty deed for the premises in question on April 6, 1926, and on that date the purchase money was paid over to the defendants, less all credits for pro-rating, making a net balance of \$9427.78, and on that date the defendants gave their re-

LARRY F. KELLEY Plaintiff vs. LUCILLE A. KELLEY and CARL KELLEY Defendants

THE VERDICT OF THE COURT

This is an appeal by the plaintiff from a judgment in favor of the defendants entered upon the finding of the court. The statement of claim alleges in substance that the defendants are indebted to the plaintiff in the sum of \$191.00, being the fair and reasonable price of the use and occupation of the premises known as 701 Main Avenue, San Francisco, California, for the period commencing April 6, 1930, and ending April 21, 1930. The statement of claim alleges demand for payment by plaintiff and refusal by defendants.

The facts in the case are not disputed. On March 6, 1930, defendant sent the receipt of the transfer in question, and on that date entered into a real estate sales contract, whereby plaintiff agreed to purchase of the defendants the premises in question for the sum of \$18,500, subject to a first mortgage in the sum of \$2,000. The balance of \$16,500 to be paid in cash. With other provisions in the contract was the following clause: "Rescission on or before May 1, 1930."

Pursuant to this contract the defendants executed and delivered to the plaintiff a warranty deed for the premises in question on April 6, 1930, and on that date the purchase money was paid over to the defendants, less all credits for pro-rating, making a net balance of \$16,500.75, and on that date the defendants gave their re-

ceipt to the plaintiff for this money. They remained in possession of the premises from that date until May 1st, and the plaintiff contends as a matter of law that they are liable for the use and occupation of the premises during that time. The evidence indicates that the sum claimed would be a fair and reasonable price for such use and occupation in case defendants are liable.

To his proposition of law the plaintiff cites one case, Larabee v. Lambert, 34 Me. 79. That case is authority for the proposition that the grantor of land who remains in possession after a conveyance thereof is legally presumed to be the tenant of the grantee, ^{that} and upon that presumption, if not rebutted, assumpsit for use and occupation may be maintained. The case, however, further holds that the presumption may be repelled even by parole proof. In this case the presumption is rebutted and controlled by the written clause in the contract of sale, which, we think, on a fair construction, could be held only to mean that the grantors should not be required to give possession until on or before May 1, 1926. There is no other reasonable construction of this clause, and the written agreement of the parties of course overcomes the legal presumption.

The judgment is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

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There is no other reasonable connection of this element, and one
 would be required to give possession until an order was made in 1935.
 possession, would be held until the question should
 after there is the contract of sale, which, we think, on a fair
 in this case the possession is retained and conveyed by the
 would limit the possession may be required even by a leasehold,
 we had concluded that it was not possible to do so, and that
 matter, which had previously been not retained, accordingly the
 a leasehold estate is legally presumed to be the tenant of the
 possession that the tenant of land who remains in possession after
 termination of the lease is entitled to the land. This case is authority for the
 principle that the possession of the land is retained by the tenant of the land.

...the ... of ...

SECRET

BERRICE WILENS,
Appellee,

vs.

YELLOW CAB COMPANY, a
Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant from a judgment in the sum of \$12,000 entered upon the verdict of a jury in an action on the case for personal injuries, motions for a new trial and in arrest of judgment having been over-ruled.

When the case was submitted to the jury plaintiff's declaration consisted of four counts, which in varied phrases alleged that, while plaintiff was in the exercise of due care, she was injured October 4, 1923, near the intersection of North Clark street and West Huron street, Chicago, through being struck by an automobile negligently driven by defendant's servant. The four counts charged negligence in the running and operation and control of the automobile; negligence in failing to keep a sufficient lookout; negligence in driving at a rate of speed in excess of ten miles an hour, contrary to the law and with regard to the traffic; negligence in that, while the streets at the place of the accident passed a closely built up residential district of Chicago, defendant drove the automobile at the unlawful speed of fifteen miles an hour. The case for the defendant was submitted to the jury on a plea of the general issue.

It is contended in behalf of defendant that a preponderance of the evidence shows that plaintiff was not exercising

342 L.A. 632

EXHIBIT 100 - 1010

BY THE COURT

THE COURT
IN THE
MATTER OF
THE ESTATE OF
JAMES EARL RAY, JR.
DECEASED

IN THE MATTER OF THE ESTATE OF JAMES EARL RAY, JR.

DECEASED

This court is of the opinion that the estate of JAMES EARL RAY, JR., DECEASED, should be divided into two parts, one part to be held in trust for the benefit of the children of JAMES EARL RAY, JR., and the other part to be held for the benefit of the children of JAMES EARL RAY, JR., and the children of the children of JAMES EARL RAY, JR.

When the case was submitted to the jury, the jury

returned a verdict in favor of the estate, which in

the opinion of the court, was in the exercise of the

discretion of the court, and the court is of the

opinion that the verdict of the jury is in the exercise

of the discretion of the court, and the court is of the

opinion that the verdict of the jury is in the exercise

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of the discretion of the court, and the court is of the

due care; that defendant was not negligent; that the court erred in allowing certain exhibits to be taken by the jury, and erred in refusing a certain instruction and in denying defendant's motion for a new trial.

The uncontradicted evidence tends to show that about 7:30 on the evening of October 4, 1923, at the intersection of Clark and Huron streets, Chicago, defendant sustained severe injuries as a result of being struck by one of defendant's cabs; that plaintiff was employed in a business conducted at Cass and Huron streets, and that on the evening in question she quit work at about half past seven and with two fellow workers, Katherine Burke and Mildred Hendrickson, walked west on Huron street to Clark street, a public street extending north and south, at which place the three intended to take street cars home. Mrs. Burke and Miss Hendrickson intended to take a north-bound car and the plaintiff to take a south-bound car. The three walked together until they arrived at the southeast corner of the intersection of Huron and Clark streets, at which place plaintiff's two companions would take their car, and at that place they separated, the plaintiff starting across Clark street and intending to ultimately reach the northwest corner of the intersection, at which place she intended to take a southbound car.

Defendant's cab had, just before the accident, been driven north on Clark street, carrying a passenger whose destination was some point on Huron street east of Clark street. As they went north the driver for some reason did not turn east on Huron street but proceeded north for about a block and then turned around and came back south on the same street. The plaintiff testified that just before she started across the street she looked and saw this cab coming south on the west side of Clark street and north of Huron street.

The evidence as to further material facts is conflicting, that of plaintiff tending to show that she proceeded west on the south crosswalk of Huron street until she was near to the southwest corner of the intersection, when the driver of defendant's cab swung it towards the east on Huron street, striking her with such force and violence as to render her unconscious. Her evidence is corroborated ^{by} a witness, one Pellie, who says that at the time of the accident he was standing on the southeast corner of Clark and Huron streets; that there was no northbound traffic on Clark street at the time; that he first saw the cab as it was coming south on the southbound track riding the rails; that it was getting dark at the time and that the cab was coming, as he judged, at a speed between eighteen and twenty miles an hour; that it turned out to make a quick turn going east; that he saw the passenger talking to the driver and the driver had his head ^{turned} slightly to the left; that at the time of the collision the plaintiff stepped one step back and threw her hands up in the air, and that at the time of the accident she was between the car track and the sidewalk, about the center of Clark street, and with reference to the south crosswalk of Huron street she was past the curb further south. He says positively that the accident happened on the south side of Huron street; that he was standing about twenty feet from her when she was hit; that he never saw her leave the sidewalk; that the cab was going east in a semi-circular direction, and that when it hit plaintiff the driver changed his speed, stopping all of a sudden, and that after it was all over the cab stood on Clark street, away beyond Huron, on the south side, in a circular position. On cross-examination this witness says that at the time the automobile turned out from the southbound track it was going about eighteen or twenty miles an hour, and that when he made the turn it was going from five to eight miles an hour.

Mrs. Burke and Miss Hendrickson testified that the

first they knew of the accident was when they heard the plaintiff scream, and Mrs. Burke says, "When we heard the scream and looked up the cab was on Clark street in the middle of the block, south." On cross-examination she testified that the cab "was in the middle of the block, south of Huron street. *** It was around the middle of Huron, right in the middle of the block. I mean the middle of Huron street. In other words, I mean where Clark street crosses Huron." Miss Hendrickson says, "It was like she lay in the middle of Huron street, rather near the car tracks. I cannot say the exact place."

The cab in question was driven by one Withington. He says that between Superior and Huron streets he went about fifteen or eighteen miles an hour, but that when he got down to Huron street he slowed down and put the cab in second speed and looked around for on-coming traffic; that when he turned east his cab was on the west side of Clark street, about the middle of Huron street; that he looked both ways for traffic and especially toward the north because he wanted to swing to the left, and if there was a southbound car he wanted to avoid it; that when he made that swing there were several people crossing Clark street where the crosswalk is; that there was a woman, he guessed; that at the time he was at the crossing ready to make the turn, he looked both ways and there was no indication of anything to block his turn, and that as the car was in second speed all he had to do was to "step upon it" and go across; that as he started across plaintiff came and made "a triangular sweep across the street into the path of my cab and I was going very slow." He says he cannot possibly say whether the cab struck plaintiff, but he stopped instantaneously, put plaintiff in the cab and took her to the hospital. He did not get the name of the passenger in the cab, and when he testified he did not know who the passenger was. He says that he has not seen him since; that

first they knew of the accident was when they heard the plaintive
cry, and Mrs. Burke says, "When we heard the scream and looked
up the cab was on Clark street in the middle of the block, south."
The witness-examination she testified that the cab was in the middle
of the block, south of Clark street. "It was toward the middle
of the block, right in the middle of the block. I mean the middle of
Clark street. In other words, I mean where Clark street crosses
Clark." Miss Lundquist says, "It was like she lay in the middle
of Clark street, rather near the car tracks. I cannot say the car
was there."
The cab in question was driven by one Williamson. He
says that between Register and Clark streets he went about fifteen
feet west of Clark street, but that when he got down to Clark street
he slowed down and put the cab in second gear and looked toward
the east-bound traffic; that when he looked west the cab was on the
west side of Clark street, about the middle of Clark street; that he
looked both ways for traffic and especially toward the north because
he wanted to swing to the left, and it there was a southbound car
he wanted to avoid it; that when he made that swing there were sev-
eral people crossing Clark street where the crosswalk is; that there
was a woman, he guessed; that at the time he was at the crossing
trying to make the turn, he looked both ways and there was no indica-
tion of anything in front of him, and that as the car was in sec-
ond gear all he had to do was to "step upon it" and go across; that
as he started across plaintiff came and made "a triangular sweep
across the street into the path of my cab and I was going very
slow." He says he cannot possibly say whether the cab struck
plaintiff, but he stopped momentarily, but plaintiff in the
cab and took her to the hospital. He did not get the name of the
passenger in the cab, and when he testified he did not know who
the passenger was. He says that he has not seen him since; that

he did not recollect his fare; that when plaintiff first turned to go diagonally, the front end of his cab was possibly eight or ten feet from her; that he blew the horn and stepped on the brake and turned the car to the left in order to avoid hitting her. He says, "She was in the middle of Huron street, in the center of Huron street where it crosses."

The defendant requested the court to call one Kaminski as a witness, which the court declined to do, and thereupon he was produced by the defendant. He was in the company of Pollie at the time of the accident and saw the occurrence. He says that plaintiff walked west on Huron street; that when she got about the middle of Clark street she turned northwest; that the Yellow cab came from the north, made a turn to the east; that plaintiff went in front of the cab and fell; that it was about seven or eight feet from the cross-line to the walk where she fell.

This is the testimony of the occurrence witnesses, and, in view of the conflict in the evidence we think it must be held that the questions of whether the defendant was guilty of negligence or the plaintiff of contributory negligence, were clearly matters for the jury, and that this court can not find that the verdict of the jury is against the manifest weight of the evidence.

It is next contended in behalf of the defendant that the court erred in allowing the jury to take with it when it retired certain exhibits which were in the nature of written statements tending to impeach the testimony of the witness Kaminski. The contention seems to be that under the provisions of section 76 of chapter 110 of the Practice act, this was erroneous. That section provides: "Papers read in evidence, other than depositions, may be carried from the Bar by the jury."

It is specifically held by the Supreme court in Dunn v. People, 172 Ill. 582; People v. Clark, 301 Ill. 428, that the section in question is applicable only to civil cases. Section 20

of the Practice act, chapter 83, (Revised Statutes of 1845) provided: "When the jury retire to consider of their verdict they shall be permitted to take any papers that may have been used as evidence on the trial."

In Rawson v. Curtiss et al., 19 Ill. 455, it is stated in the opinion of the court that it had been the uniform practice in this state, theretofore unchallenged, to permit depositions read to the jury to be taken with them in their retirement and that it had been insisted that it was good practice and expressly authorized by section 20. That opinion discusses the practice at common law in England, in Pennsylvania, and in New York, showing that the matter was in the discretion of the court; and, reviewing the authorities of the different states, the court held that section 20 contemplated nothing more than patents, deeds, notes, and such like papers used as evidence and distinguished these from depositions which, as a matter of justice, it was held ought not to be allowed to go to the jury.

The enactment, therefore, of section 76 seems to be declaratory of the law of this state as it existed prior to its enactment. Bouvier's Law Dictionary, vol. 1, pp 847-8, defines a deposition as:

"The testimony of a witness reduced to writing, in due form of law, by virtue of a commission or other authority of a competent tribunal, or according to the provisions of some statute law, to be used on the trial of some question of fact in a court of justice. 3 Blatchf. 456; 23 N. J. L. 49."

It is clear, we think, that the section of the statute invoked is not at all here applicable. It would seem the proper practice is a matter much in the discretion of the court. It has been held improper to permit a jury to take with it a paper introduced in evidence purporting to be the admission or statement of what an absent party would testify to if present; (Smith v. Wise & Co., 53 Ill. 141); or an affidavit of a witness

of the evidence was, however, all, limited evidence of facts
which "from the fact that no evidence of facts would have
could be obtained in any way except that they were not
evidence of the fact."

IN RE THE ESTATE OF JAMES M. HARRIS, DECEASED.

It is the opinion of the court that it had been held
previously in this case, that the evidence was not
sufficient to show that the fact in issue was in fact
proven and that it had been held that it was not
this was expressly authorized by section 50. That opinion was
given the evidence of common law in England, in Pennsylvania, and
in New York, showing that the matter was in the discretion of the
court, and, therefore, the admission of the evidence was
the court held that evidence in this case was not
relevant, direct, and such like papers need no evidence and
distinguished those from depositions which, as a matter of justice,
it was held ought not to be allowed to go to the jury.
The court, therefore, of section 70 seems to be
testimony of the law of this state as it existed prior to the
enactment. New York's Law Dictionary, vol. 1, no 647-8, defines
a deposition as:

"The testimony of a witness reduced to writing, in the
form of law, by virtue of a commission or other authority of
a competent tribunal, or according to the provisions of some
statute law, to be used on the trial of some question of fact
in a court of justice. 2 Blackst. 486; 2 N. Y. L. 42."

It is clear, we think, that the section of the

statute involved is not at all here applicable. It would seem

that the statute is a matter which is the question of the

fact. It has been held improper to permit a jury to take issue

it a paper introduced in evidence purporting to be the admission

or statement of what an absent party would testify to if present;

(Harris v. Harris, 100 N. Y. 100) as an admission of a witness

admitted in evidence for the purpose of contradicting and impeaching his testimony. (Pein v. Covenant Mutual Benefit Assoc., 60 Ill. App. 274); or a written statement tending to impeach a witness although apparently not sworn to; (Johnson v. M. K. Fairbank Co., 156 Ill. App. 381); or objections which had been filed to the confirmation of an assessment; (West Frankfort v. Marsh Lodge, 315 Ill. 32.)

The plaintiff here contends that if there was error in this respect it was induced by the defendant, who insisted that certain other writings in evidence, introduced by the defendant apparently for the purpose of discrediting the witness Pollie, should be sent to the jury; that when defendant requested this to be done, counsel for plaintiff simply insisted that, if the papers introduced by defendant were sent to the jury, those of the plaintiff should also be given to them. The record bears out the contention of the plaintiff that this was the way in which the papers happened to be given to the jury, counsel for plaintiff insisting that if one paper was given all should be, and the Judge ruling with the plaintiff. Defendant cannot, of course, complain in this court of an error which he himself induced the court to make. (McKinnie v. Lane, 230 Ill. 544; Zinger v. Sanitary Dist. of Chicago, 175 Ill. App. 9.) We do not think the ruling of the court in this matter was erroneous as an abuse of discretion; but if it was error, we think it was not reversible error under circumstances such as here appear.

The defendant further contends that the court erred in refusing to give to the jury the following instruction requested by defendant:

"The court instructs the jury that if you believe from the evidence in this case, under the instructions of the court, that the plaintiff saw the cab in question approaching the intersection in question from the north when she was on the south crosswalk of the said intersection; and that so seeing the said cab

so approaching, she attempted to cross the said intersection diagonally in a northwesterly direction and in front of the said cab, and if you further believe from the evidence that her so attempting to so cross the said intersection was negligence which proximately caused or proximately contributed to cause the accident in question, then there can be no recovery in this case and you should find the defendant not guilty."

It is urged that this instruction should have been given on the authority of Carlin, Adm. v. Grand Trunk Ry. Co., 243 Ill. 64, Keokuk Bridge Co. v. Wetzel, 228 Ill. 253, and many other cases cited. We think the court did not err in refusing to give this instruction, for two reasons. In the first place, the substance of the instruction refused was covered in other instructions given. The court in instruction No. 22 told the jury that the servant of the defendant was required to exercise only ordinary care, and that if the jury believed from the evidence, under the instructions of the court, that as the cab approached the place of the accident it was being operated with ordinary care and that the driver of the cab, in the exercise of ordinary care, did all he could to avoid the accident in question as soon as it was apparent or ascertainable to him, in the exercise of ordinary care, that the plaintiff was crossing the street diagonally and getting into a position of danger, if the jury believed from the evidence that she did so cross, then plaintiff could not recover and the finding should be for the defendant. And by instruction No. 23 the jury was told that, if they believed from the evidence that the cab was being operated with ordinary care and that the plaintiff ran in the way of the cab so suddenly that the driver of the cab had no opportunity, in the exercise of ordinary care and caution, to avoid injuring the plaintiff, the verdict should be not guilty. In the second place, we think the instruction is subject to criticism in that it takes from the jury the question of whether, even assuming that the plaintiff left the cross-walk and preceeded across the intersection diagonally in a northwesterly direction, she might not

have so proceeded in the exercise of ordinary care.

The jury was fully instructed upon every phase of this case, which, after all, presented simple issues of fact upon which the jury reached a verdict with which, after considering all the evidence, we are unable to disagree.

The judgment is just and it is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

There is no question in the minds of the people of this country.

The fact that the people of this country are not

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THE PEOPLE OF THE STATE OF
ILLINOIS ex rel. ERNA ZULKE,
Appellee,

vs.

GLEN HOUSE,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT

DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant who seeks to reverse a judgment entered against him in a proceeding under the Bastardy act, by which he was required to pay \$1,100 for the support, maintenance and education of the child and to give bond with surety to secure the payment of the same, in default of which he was ordered committed to the county jail, "there to remain until he shall comply with this judgment order or until otherwise discharged by due course of law."

The record shows that Erna Zulke filed complaint that on June 15, 1926, she was delivered of a male bastard child and that the defendant, Glen House, was the father of said child. This complaint was signed "Erna Zielke," and the affidavit which was attached thereto purported to be made in the name of Erna Zulke in the body thereof, while the signature attached thereto is "Erna Zielke."

The record shows that an order was entered giving leave to Erna Zulke, "in the name of the People of the State of Illinois," to file her complaint, and that it was ordered that a warrant issue against the defendant and his bail was fixed at \$2,000; that a warrant issued pursuant to said order, in which the relatrix was described as "Erna Zulke;" that upon motion of the defendant the cause was postponed from December 28, 1926, to January 11, 1927, and again on defendant's motion to January 18, 1927, the defendant having entered into a bond with surety; that the defendant demanded trial

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STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

THE PEOPLE OF THE COUNTY OF LOS ANGELES
DO hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the files of the County Clerk of said County.

IN WITNESS WHEREOF, I, the County Clerk of said County, have hereunto set my hand and the seal of said County at Los Angeles, California, this 1st day of January, 1927.

This is an appeal by the defendant from the order of the

court a judgment entered against him in a proceeding under the

act of 1913, by which he was required to pay \$1,100 for the sup-

port, maintenance and education of the child and to give bond

with surety to secure the payment of the same, in default of which

he was ordered committed to the county jail, "there to remain until

he shall comply with this judgment order or until otherwise dis-

posed by the course of law."

The record shows that James E. Sullivan filed complaint that

on July 12, 1926, she was delivered of a male bastard child and that

the defendant, Edwin Hanson, was the father of said child. This com-

plaint was signed "Edwin Hanson," and the affidavit which was attached

thereto purported to be made in the name of Edwin Hanson in the body

thereof, while the signature attached thereto is "Edwin Hanson."

The record shows that an order was entered giving leave

to said child, "in the name of the People of the State of California,"

to this now appearing, and that it was ordered that a return be made

against the defendant and his bail was fixed at \$1,100; that a writ

was issued pursuant to said order, in which the release was con-

ditioned as "Edwin Hanson," that upon motion of the defendant the same

was postponed from December 22, 1926, to January 11, 1927, and again

on defendant's motion to January 12, 1927, the defendant having

entered into a bond with surety; that the defendant committed said

by jury, entered a plea of not guilty; that the jury was impaneled and sworn to try the issues; testimony heard; the cause argued by counsel; the jury instructed by the court; and that the jury returned a verdict finding "that Erna Zulke was on June 15, 1926, delivered of a male bastard child born alive, and that defendant Glen House is the father of said child;" that the defendant made motions for a new trial and in arrest of judgment, both of which were over-ruled. The record does not contain any bill of exceptions.

It is first contended by appellant that the judgment should be reversed because the complaint does not comply with the provisions of section 33, article 6, of the Constitution of the State of Illinois, which directs in substance that all prosecutions shall be carried on in the name and by the authority of the People of the State of Illinois and conclude against the peace and dignity of the same. (See Cahill's Rev. Stat. 1925, page 217.) The recent case of People v. Whitmer, 243 Ill. App. 244, is cited to that point, and appellant contends that the question raised is settled in his favor by that decision. That was a prosecution brought under the Illinois Securities law, also known as the Blue Sky law. (See Cahill's Ill. Rev. Stat. 1925, chapter 32, section 254, et seq.)

Section 30 of that act makes the failure to comply with certain provisions thereof a misdemeanor and prescribes a punishment for the first offense of a fine in any sum not exceeding \$10,000, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment, in the discretion of the court. Section 31 of the act provides a heavier penalty in case of second or subsequent offenses. That case is very far from being at all analogous to the proceeding which we are here required to review.

It has been held in a long line of cases that the pro-

ceeding provided by statute to compel a father to support his child born out of wedlock is not in any sense a criminal proceeding. It is true that the procedure prescribed by the statute is analogous to that followed in criminal cases, but the proceeding in its nature is not at all criminal. Its purpose is not to punish for a wrong against the state. Only the mother has the right to begin and maintain the prosecution. Only a preponderance of the evidence is necessary to establish her case. The cases holding that a proceeding of this sort is not criminal in its nature are cited and reviewed in the case of People v. Humbracht, 215 Ill. App. 29, and it is unnecessary to repeat here what was said there. See also People v. Ciemeniowski, 221 Ill. App. 275. The provision of the constitution on which appellant relies is undoubtedly mandatory in criminal cases. Hay v. People, 59 Ill. 94; People v. Gartenstein, 248 Ill. 546; State v. Froelich, 316 Ill. 77. But this proceeding is not criminal, and the provision therefore is not applicable.

It is next contended that the verdict and judgment are not responsive to the complaint, for the reason that it does not appear that Erna Zielke and Erna Zulke are one and the same person. It may be that, as defendant contends, the names "Zielke" and "Zulke" are not idem sonans, but, as the State's attorney suggests, there is no bill of exceptions, and it might well be that such a bill would show either that the complainant was known by the one name as well as the other, or that customarily in the community where she lived these varied names were given the same pronunciation. (See 29 Cyclopaedia of Law and Procedure, 272-275.) In the absence of a bill of exceptions the contention of the defendant on this point cannot be sustained.

Objection is also made to the form of the order, first, in that the judgment requires the money to be paid to the clerk of the court instead of to the mother of the child. The judgment, however, is in favor of the mother, who was complainant, and we

...provision by statute to compel a father to support his child
born out of wedlock is not in my view a criminal provision. It
is true that the provision is directed at the father in relation
to that father in criminal cases, but the proceeding in the nature
is not at all criminal. The remedy is not to punish but to compel
against the state. Only the mother has the right to begin and main-
tain the proceeding. Only a guardianship of the person in nature
only is retained here. The state is not a party to the proceeding
of this kind is not criminal in its nature and is not
in the case of Ex parte Foster, 125 Ill. 400, 101 Ill. 400, 101 Ill. 400.
The provision of the constitution
as to criminal action is undoubtedly mandatory in criminal cases.
Ex parte Foster, 125 Ill. 400, 101 Ill. 400, 101 Ill. 400.
Ex parte Foster, 125 Ill. 400, 101 Ill. 400, 101 Ill. 400.
and the provision is not applicable.
It is now contended that the verdict and judgment are
not responsive to the complaint, for the reason that it does not
appear that John White and John White are one and the same person.
It may be that, as the state's attorney says, "White" is not the same person, but as the state's attorney says,
there is no bill of exception, and it might well be that even a
bill would show either that the complaint was made by the one
name as well as the other, or that notwithstanding in the complaint
where the first named person was given the same designation.
(See 20 Cyclopaedia of Law and Procedure, 178-179.) In the absence
of a bill of exception the contention of the defendant in this
case cannot be sustained.
Objection is also made to the form of the order, first,
in that the judgment requires the money to be paid to the clerk of
the court instead of to the mother of the child. The judgment,
however, is in favor of the mother, who was complainant, and no

do not think the defendant has any standing to complain in this respect.

The judgment directed the defendant to give security and provided that in case he refused or neglected so to do, he "shall be committed to the county jail of the County of Cook, State of Illinois, there to remain until he shall comply with this judgment order, or until otherwise discharged by due course of law." It is urged that the judgment is erroneous in this respect because it does not incorporate therein the provision of Section 9 of the Bastardy act, which provides that any person so committed shall be discharged for insolvency or inability to give bond, provided that such discharge shall not be made within six months after such commitment. The order follows the language of the statute and defendant's rights are sufficiently protected.

The judgment appears to be just. The reasons urged for reversal are purely technical and without merit.

The judgment is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

The judgment rendered in this case is not only a landmark in the history of the law, but it is also a landmark in the history of the people. It is a landmark in the history of the law because it is the first time that the law has been applied to the people in this manner. It is a landmark in the history of the people because it is the first time that the people have been able to bring their grievances to the attention of the law. The judgment is a landmark in the history of the law because it is the first time that the law has been applied to the people in this manner. It is a landmark in the history of the people because it is the first time that the people have been able to bring their grievances to the attention of the law.

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SOL RUBIN,
Appellant,

vs.

ISRAEL BLUME, SAMUEL MIDLINSKY
and CHARLES COHNS, Trustees,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The appellant, Sol Rubin, was the complainant in the trial court and seeks by this appeal to reverse a decree entered by the Superior court of Cook county on July 15, 1926, in and by which that court sustained the joint and several pleas of res adjudicata set up by the defendants, held that the complainant was barred from further claiming any rights as in his bill of complaint alleged, and dismissed the bill for want of equity at complainant's costs. The pleas of res adjudicata were filed after defendants had by leave of court withdrawn other pleadings, and although complainant filed a replication to the pleas, this replication was, prior to the hearing, withdrawn.

The bill of complaint was filed in the Superior court April 11, 1924, and the material averments therein set forth were that complainant was the owner in fee simple of certain real estate situated in Cook county, Illinois, therein described, which premises were vacant and unoccupied, and that the fair cash market value of the said premises was \$25,000; that the title to said premises was held by Israel Blume for convenience only; that this title was derived by deed from a master in chancery, dated April 9, 1921, and by deed from Morris H. Levin and wife to defendant Blume, dated March 18, 1921; that the title to the premises is held by Blume for the other defendant, Samuel Midlinsky, as an equitable mortgage only to secure the payment by complainant to Midlinsky of certain moneys due him; that complainant is the real owner of the property

subject to the lien of the indebtedness; that he had requested an accounting with Midlinsky and is ready and willing to pay him whatever is due, but that Midlinsky has refused to inform him what the amount is; that complainant offers to bring into court any sum of money that the court shall find he owes Midlinsky; prays for an answer from Midlinsky, Blume and one Charles L. Cohns as trustee; that an accounting may be had, the amount of money due from complainant to Midlinsky ascertained, and that the court may decree that the title to the premises is held by Blume as security for the payment of this money; that upon payment of the same the premises may be deeded to the complainant; that Cohns may be ordered to release the trust deed against the same, and that an injunction may issue enjoining and restraining Midlinsky and Blume from conveying or attempting to convey the premises or mortgaging or otherwise disposing of the same, and for other and further relief.

The joint and several pleas of res adjudicata set up in substance that on April 12, 1922, complainant filed a certain bill of complaint in the office of the Circuit court of Cook county, namely, B84300, against the defendants, Samuel Midlinsky, Israel Blume and Chicago Title & Trust Company, which bill was afterwards by leave of court amended, in which, setting up in detail the transactions of defendants with reference to the title of this real estate he prayed that the court might by its order decree and find that he was the real and equitable owner of the same, and that Israel Blume was holding the same and the title thereto in trust for him, and that Blume might be directed by the court, upon just and equitable terms, to which complainant offered to conform, to convey to the complainant the said premises.

The bill and amended bills were set up in haec verba; that to this amended bill of complaint, as the same was afterwards amended, defendants Samuel Midlinsky and Israel Blume filed general and special demurrers, which came on for hearing, and that the same,

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subject in the line of the information; that he had represented as
accounting with Williams and is ready and willing to pay him what
ever is due, but that Williams has refused to accept him what the
amount is; that defendant offers to bring into court any sum of
money that the court shall find he owes Williams; pays for an an-
not for Williams, James and one Charles L. James as trustees; that
an accounting may be had, the amount of money due from defendant to
Williams ascertained, and that the court may return that the title
to the property is held by James as security for the payment of this
money; that upon payment of the same the premises may be decreed to
the defendant; that James may be ordered to release the trust from
against the same, and that an injunction may issue restraining and re-
straining Williams and James from conveying or attempting to convey
the premises or mortgaging or otherwise disposing of the same, and
for other and further relief.

The joint and several plea of the defendants set up
in answer thereto that on April 12, 1900, complaint filed a certain
bill of complaint in the office of the circuit court of Cook county,
Illinois, against the defendants, Samuel Williams, James
James and Chicago Title & Trust Company, which bill was returned
by leave of court amended, in which, setting up in detail the trans-
actions of defendant with reference to the title of said real estate
he prayed that the court might by its order decree and find that he
was the true and lawful owner of the same, and that Samuel James
and the Chicago Title and Trust Company were his agents, and
that James was in violation of the trust, and that the same should
be decreed to him, and that the title should be decreed to him
and that the same should be decreed to him, and that the same should
be decreed to him, and that the same should be decreed to him.

The bill was amended bill was set up in answer thereto
that to this amended bill of complaint, as the same was amended in
answer thereto, defendant Samuel Williams and James James filed general
and special demurrers, which came on for hearing, and that the same,

having been considered by the court, were sustained by an order entered on March 17, 1924, which order stated that the demurrers having been sustained the complainant elected to stand by his amended bill of complaint as amended, and that the cause was thereby dismissed for want of equity at complainant's costs; that the complainant prayed an appeal to the Appellate court of Illinois for the First district, which appeal was allowed; that he perfected said appeal and filed the record of said cause in the Appellate court, and that said Appellate court of Illinois for the First district determined by its opinion, rendered and filed April 13, 1925, that the said decree should be affirmed; that the complainant then petitioned the Appellate court for a rehearing of the cause, which was denied by said court; that complainant thereupon prosecuted his petition for a writ of certiorari to the Supreme court of Illinois to review and reverse the final opinion of the said Appellate court, and that this petition was by the Supreme court of the State of Illinois denied on October 26, 1925, and said order and denial of record were then transmitted back to said Appellate court; that the said judgment of the Appellate court remaining final, it issued its mandate in said cause under date of November 6, 1925, affirming in all respects the decretal order entered by Judge Wilson on March 17, 1925.

The amended bill as amended, the decree of the Circuit court, the opinion of the Appellate court and its order and judgment are set forth at length in the pleas, and the pleas aver that such rights and interests as complainant claimed in the said Circuit court, cause B84300, were the same as he now claims by his present bill, and that relief was therein prayed against Samuel Widlinsky and Blume in the same manner and for the same matters and to the same effect as the complainant now prays by his bill, and it is averred that thereby said cause in said court was finally determined

having been considered by the court, were withdrawn by an order
dated on March 14, 1938, which order stated that the defendant
had then sustained the complaint except as stated by him
in the bill of complaint as amended, and that the case was then
by himself the way of equity as complainant's case; that the
complaint stayed on appeal to the appellate court of Illinois
the first district, which appeal was allowed; that he per-
mitted with appeal and filed the record of said cause in the ap-
ellate court, and that said appellate court of Illinois for the
first district determined by its opinion, rendered on April 14, 1938,
that the bill of complaint should be affirmed; that the ap-
pellant then petitioned the appellate court for a rehearing of
the case, which was denied by said court; that complainant there-
upon presented his petition for a writ of certiorari to the Supreme
court of Illinois to review and reverse the final opinion of the
said appellate court, and that this petition was by the Supreme court
of the State of Illinois denied on October 22, 1938, and said order
and denial of record were then transmitted back to said appellate
court; that the said judgment of the appellate court remaining final,
it issued its mandate by said court under date of November 6, 1938,
affirming in all respects the decreed order entered by Judge Wilson
on March 14, 1938.

The amended bill as amended, the decree of the Illinois
court, the opinion of the appellate court and its order and judgment
are set forth at length in the plea, and the plea was filed with
rights and interests as complainant claimed in the said Chicago
court, known as HANCOCK, were the same as he now claims by his present
bill, and that relief was therein prayed against Samuel William
and HANCOCK in the same manner and for the same matters and to the
same effect as the complainant now prays by his bill, and it is
stated that thereby said cause in said court was finally determined

against the complainant, and that he, the complainant, was forever concluded and barred from again asserting upon the same grounds, matters and things as therein set forth and therein finally determined against him, the same being res adjudicata of all the matters and things in his bill of complaint in the said Circuit court set forth, and ^{and} for/on account of which he prayed relief therein and which are the same right, title, interest and alleged trust that he declared upon and prayed relief for in his bill of complaint herein, he being herein barred and concluded by the final judgment of the said Circuit court aforesaid.

It is unnecessary in this opinion to set forth at greater length the pleadings. The opinion of this court upon an appeal from cause 284300 is abstracted in Rubin v. Widlinsky et al., 237 Ill. App. 636, and it is unnecessary to repeat in detail what is there stated. It is sufficient to say that a comparison of these two records discloses a suit concerning identical property between identical parties, claiming an identical right, upon substantially identical grounds. It will also be unnecessary to review at length the many cases in which the doctrine of res adjudicata has been applied. The recent statement of the doctrine in Winkelman v. Winkelman, 310 Ill. 568, declares the rule with clearness and states it to be "that when a fact or question has been actually and directly in issue in a former suit and a judicial determination has been had upon such issue by a domestic court of competent jurisdiction, the judgment of that court in such case is conclusive so far as concerns the parties to that action and persons in privity with them, and cannot be again litigated in a future action between such parties or their privies in the same court or in any other court of concurrent jurisdiction upon the same or a different cause of action. (Keynolds v. Mandel, 175 Ill. 615; Wright v. Griffey, 147 Ill. 496; Rowell v. Smith,

123 Wis. 510; 23 Cyc. 1215]. Where the title to property is directly put in issue in a suit at law or in equity, whether it be by the pleadings or in the course of litigation, and such issue is tried and determined, the judgment is conclusive in all further litigation between the same parties or their privies, whatever may have been the nature or purpose of the action in which the judgment was rendered or of that in which the estoppel is set up. (Peterson v. Nohf, 80 Ill. 25; Kelly v. Dealin, 70 Ill. 378.)"

The same rule has been repeatedly declared, as in Foss v. Peoples Gas Light & Coke Co., 203 Ill. 94; In re Northwestern University, 206 Ill. 61, and many other cases. Indeed, our Supreme court has gone further, as in Marie Church v. Trinity Church, 253 Ill., 51, where it was held:

"A complainant must present all the grounds showing his right to the relief prayed for, which could have been presented, and if he does not, he will not be allowed in a second suit to take advantage of the omission. All questions relating to the same subject matter, which were open to consideration and could have been presented, are conclusively settled, whether they were presented or not. (Bailey v. Bailey, 115 Ill. 551; Harmen v. Auditor of Public Accounts, 123 Ill. 122; Lusk v. City of Chicago, 211 Ill. 183.)"

The complainant contends, however, that the law is that where a bill is dismissed on demurrer because it shows no right to relief, the plea is not res adjudicata where a subsequent bill sets out a case calling for relief. Farwell v. Great Western Telegraph Co., 161 Ill. 522, and many other cases are cited to this point. None of the cases, however, in our opinion sustains the rule for which the complaint contends. It is true that where the judgment entered is because of a defective pleading or because facts alleged in the bill or petition fail to show that the court has jurisdiction of the cause, a judgment entered under such circumstances will not be a bar to a subsequent well stated cause of action; but the record of the Circuit court here pleaded and the opinion of the appellate court, upon which judgment was entered

herein, show that the final judgment was not entered because of a defective pleading nor because the facts stated failed to disclose jurisdiction in the court trying the same, but on the contrary that the facts set up in the pleading showed a defective title in a cause wherein the court appealed to had jurisdiction. There is, of course, no reason why parties who wish to present the issues involved in a suit, either at law or in equity, on the merits by a demurrer should not be concluded upon the judgment upon such a hearing. Indeed, a demurrer in chancery is always to the merits and in bar of the relief sought and proceeds upon the ground that, admitting the facts in the bill to be true, the complainant is not entitled to the relief he seeks. The cases so holding are set forth in Marie Church v. Trinity Church, supra. and it is unnecessary for this court to repeat what the Supreme court of the state has so often said. There would be no end to litigation if suits such as that complainant here seeks to prosecute were allowed. The suit in the Circuit court was before a court having jurisdiction of the subject matter of the suit. It is not alleged that there was any fraud or collusion in the judgment which was there entered. The cause was submitted upon the defendant's demurrer to the amended bill of complaint as amended and judgment thus given upon the merits. Complainant elected to abide by the cause as stated in the bill, prayed his appeal, which was allowed, and upon that appeal prosecuted by him the judgment of the Circuit court was affirmed. It is a complete bar to the action now brought.

The decree is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

W. B. MARTIN,
Appellee,

vs.

CHICAGO FLAT JANITORS' UNION
et al.
Appeal of OSCAR F. NELSON, JOHN
WATTIS and REX PAGE,
Appellants.

APPEAL FROM INTERLOCUTORY
ORDER OF THE CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

By this appeal certain defendants seek to reverse a temporary injunction issued by the Circuit court of Cook county on March 31, 1927.

By this order the defendants were enjoined from picketing a building owned by the complainant located at the southwest corner of East Walton place and Seneca street, Chicago; from soliciting, inducing, directing or compelling anyone not a member of the defendant Janitors' Union to abstain from dealing with the complainant or from rendering service or making deliveries to the complainant or any person residing in the building; from fining, suspending, expelling, or otherwise penalizing, disciplining or discriminating against any member of any labor union, other than the Janitors' Union, who rendered service or made deliveries to the complainant or to any person residing in the building; from interfering with the management or operation of the building of complainant; from annoying, harassing, menacing, intimidating, or otherwise molesting anyone employed by the complainant, or anyone residing in the building, or anyone dealing with or rendering service to the complainant; from injuring any property owned or used by the complainant or any person residing in the building; from boycotting the complainant or anyone residing in the building; from attempting, threatening, causing, advising, encouraging, aiding, supporting or in any way

2451A.635

W. E. KATZ

Chicago, Ill.

UNITED STATES DISTRICT COURT

OF THE DISTRICT OF COLUMBIA

IN RE: [illegible]

MEMORANDUM FOR THE COURT

OF THE DISTRICT OF COLUMBIA

FILED

THE DISTRICT OF COLUMBIA

IN RE: [illegible]

By this order the following were retained from the

property interest owned by the District of Columbia

March 11, 1937

By this order the following were retained from the

property interest owned by the District of Columbia

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participating in the doing of any of the things in said order forbidden.

The injunction order was issued upon the filing of the bill and without notice, and the defendants contend in the first place that neither in the bill nor in the affidavit filed therewith was there any allegation of fact which would warrant the issuance of a temporary injunction without notice.

The bill alleged that complainant was the owner of an apartment building containing six apartments and a janitor's apartment, five of which apartments were occupied by lessees from complainant and the sixth apartment occupied by complainant, each apartment containing approximately twelve rooms; that the complainant employed one janitor and two elevator operators in the building; that the building has a frontage of approximately fifty feet on East Walton place and one hundred feet on Seneca street, with entrances on both streets and a service entrance on an alley in the rear of the building, through which deliveries of supplies were made to occupants of the building; that until 1920 the complainant operated the building insofar as his janitor was concerned as a closed shop, according to the terms of a written agreement with the Janitors' Union; that after the agreement expired the building was operated upon the open shop basis; that in 1923 complainant employed the defendant Pace as janitor of the building, and that he was at that time a member of the Janitors' Union; that in 1927 certain painters who worked upon the building had slightly marred the rear hallway in a few places, and complainant requested the defendant Pace to touch up these marred spots with brush and paint, which he did; that in February complainant requested said defendant to put on these marred spots a second coat of paint, and that defendant Pace replied that he did not know how he could arrange it, as the Janitors' Union prohibited him from doing any

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... him from ... any

painting; that complainant said the job amounted only to two hours work, was a small and trivial task which he did not see how the Union could refuse to permit a janitor to do; that Pace then told complainant that he better get another man, and that afterwards in a telephone conversation in which the matter was discussed, defendant Pace stated that he would continue in complainant's employment until March 15, 1927, and then would vacate the janitor's apartment which he occupied; that about February 21, 1927, complainant engaged another janitor, who was a member of the Janitors' Union, named "Ben" to begin work on March 15; that about March 8th defendant Mattis, a representative of the Janitors' Union, told complainant's secretary, "We'll boycott his building;" that on March 15th the janitor Ben reported for duty about nine o'clock a. m.; that complainant then gave Pace a check for his wages to date and \$15 additional as a bonus and asked Pace to advise Ben as to the work in the building, which Pace refused to do, saying that he was under orders from the Janitors' Union; that on the next day defendant Mattis, a delegate and representative of the Union, called at the building and talked to Ben, who shortly thereafter quit complainant's employment; that about eleven o'clock a. m. of the same day, members of the Union, including Mattis, instituted a system of picketing the building which has continued ever since; that four or five members of the representatives of the Union, including Mattis and Pace, have regularly engaged in the picketing under the direction of Mattis as delegate and representative of the Janitors' Union; that the picketing commenced by the defendants and other members whose names are unknown to the complainant, between eight and nine o'clock a. m. and continued daily until about six o'clock p. m.; that the pickets stood and patrolled on East Walton place across the street from complainant's building and at the northeast and northwest corners of Delaware

place and Seneca street, about half a block south of complainant's building, watching the building and those entering and leaving it; that the pickets maintained an observation upon those who ordinarily delivered supplies to the building and upon the tenants of the building and intercepted and stopped drivers and chauffeurs of wagons and trucks about to deliver milk, groceries, meats, coal, laundry, and other merchandise to the building and to the tenants of the building; that they informed such drivers and chauffeurs that a strike was on against the building and that they could not make any deliveries to the building or they would be fined by their respective unions; that the pickets shouted to drivers and chauffeurs approaching the building for the purpose of making deliveries therein that there was a strike on and not to go in.

The bill also alleged that by reason of the foregoing no deliveries had been made to the building since the picketing was instituted except that milk was delivered to complainant and to one of the tenants of the building who required a special brand of milk because of illness in his family; that complainant offered protection to the drivers and chauffeurs if they made deliveries but they refused to do so, saying that they had been told not to do so and that they feared they would be injured by the pickets if they did so; that on March 24, 1937, a lumber wagon driver bringing lumber to the building refused to deliver such lumber, stating that he had seen the sluggers from the Janitors' Union and feared that if he delivered the lumber to complainant they would assault and beat him; that on the same day a carpenter employed by complainant was intercepted and stopped by two of the pickets while returning from a nearby store with some materials, and the pickets said to him that he better stay out of the building; that the pickets also called upon storekeepers and other business men in the neighborhood and informed them that if they made any further deliveries

place and across street, about half a block north of Washington
building, reaching the building and those entering and leaving it;
that the witness maintained an observation upon those who entered
and left the building and upon the entrance of the
building and observed and stopped drivers and passengers of
vehicles and looked about for deliver milk, groceries, meats, coal,
laundry, and other necessaries to the building and to the tenants
of the building; that they informed each driver and passenger
that a vehicle was on against the building and that they could not
make any delivery to the building or that they would be taken to
their respective places; that the witness observed on drivers and
passengers approaching the building for the purpose of making de-
liveries therein that there was a strike on and not to go in.
The bill then alleged that by reason of the foregoing
no deliveries had been made to the building since the striking was
initiated except that milk was delivered to complainant and to
one of the tenants of the building who reported a special permit at
the point of delivery in his locality; that complainant offered
protection to the drivers and passengers if they made deliveries
but they refused to do so, saying that they had been told not to do
so and that they feared they would be injured by the strikers if
they did so; that on March 25, 1937, a lumber wagon driver bringing
lumber to the building refused to deliver such lumber, claiming that
he had seen the signers from the Tenants' Union and feared them
if he delivered the lumber so complainant they would assault and
kill him; that on the same day a contractor employed by complainant
was interrupted and stopped by two of the strikers while returning
from a nearby store with some materials, and the strikers told he
that they had better stay out of the building; that the strikers also
advised that visitors and other persons were to be kept out
and that delivery should not be made to the building.

to complainant's building their drivers and chauffeurs would be called out on strike; that on March 16, 1927, after the janitor named Ben had quit the employment of complainant, complainant employed another janitor who worked for about half an hour and then quit; that complainant thereafter engaged another janitor who has since continued in complainant's employ but who fears the pickets and fears that he will be assaulted by them or at their instance if an opportunity is afforded them to do so, and he remains in the building continually; that Pace refused to vacate the apartment occupied by him while janitor for complainant and maintained possession of the same even while engaged in picketing the building; that on March 29, 1927, while the night elevator operator employed by complainant was on his way to the building he was stopped by one of the pickets on Delaware place, one block from the building, and the picket said that the elevator operator had no business working at Martin's and that he had better stay away with his family if he knew what was good for him; that other owners of apartment buildings in Chicago who had similar differences had bombs placed and exploded in or near the buildings involved in the controversies in the nighttime by persons unknown, and who, complainant charged, were procured by the Janitors' Union; that these practices had been commonly resorted to in Chicago; that labor unions have fined their members and have suspended and expelled their members and otherwise disciplined them, or threatened to do so, for rendering service contrary to the policy of the unions to persons involved in controversies with the unions, and that members of these labor unions feared that they would incur penalties and such disciplinary measures at the hands of the unions if they rendered such service, and because of their fear members of the unions refused and failed to render such service, which but for the existence of such controversies they would render.

is complaint's building their driver and chauffeur would be
called out on strike; that on March 18, 1937, after the janitor
told him that the complaint of complaint, complaint was
placed under the janitor who worked for about half an hour and then
said that complaint therefor engaged another janitor who had
also complaint in complaint's employ but who took the place
and that he will be assisted by them or at their instance if
an opportunity is afforded them to do so, and he remains in the
building until called; that from time to time the complaint
called by the office building for complaint and maintained
operation of the same from while engaged in operating the building;
that on March 20, 1937, while the night elevator operator
employed by complaint was on his way to the building he was
tripped by one of the clerks on Belmont place, one black from
the building, and the clerk said that the elevator operator had
no business working at night and that he had better stay away
from the building; that he knew what was good for him; that other two
one of complaint's buildings in Chicago who had similar this evening
and some things and exploded in or near the building involved
in the controversy in the nighttime by persons unknown, and the
complaint's building, was destroyed by the building's fire;
these activities had been commonly resorted to in Chicago; that
other unions have fired their members and have engaged and
called their members and otherwise disciplined them, or threatened
to do so, for refusing service entirely or for failing to
allow to persons involved in controversies with the union, and
that members of these labor unions have been well known
punished and such disciplinary measures at the hands of the
unions if they rendered such service, and because of their fear
members of the unions refused and failed to render such service,
which but for the existence of such controversies they would render.

The bill charged that the Union and the defendants Nelson, the agent of the Union, Mattis, Pace, and the unknown pickets, unlawfully combined and conspired to interfere with and injure complainant in the operation of the building for the sole purpose of compelling him to discharge the janitor employed by him and to compel the complainant to employ as janitor of the building a member of the Janitors' Union and to compel complainant to unionize his two elevator operators, and conspired to so compel complainant by causing complainant's building to be picketed and by causing persons to fail and refuse to deliver milk, groceries, meats, laundry, coal, and other merchandise and supplies to the tenants of complainant's building or for the use of complainant in operating the building; that it was the intention of the defendants to continue the picketing and other interferences with the operation of the building and with the deliveries to the tenants of the building until complainant complied with the requirement of the Janitors' Union; that the tenants of the complainant objected to and resented the presence of the pickets and the observation by the pickets annoyed and intimidated the tenants and their families; that the tenants were accustomed to deliveries of milk, groceries, meats and other commodities, and if deprived of such deliveries and service, the tenants of the building would move from the building to places where they might obtain such; that if the tenants of complainant vacated the building, complainant would be deprived of the income from the rentals; that he had and would have difficulty in renting the apartments in the building because of the picketing and interference with and stoppage of deliveries thereto; that complainant had been compelled to employ a large force of guards to protect and guard the building and was under heavy expense therefor.

The complainant also averred that the defendants relied

and depended upon an act of the General Assembly of Illinois for their justification, commonly known as the Anti-Injunction Law, section 1 of which is quoted verbatim in the bill, and which act, for reasons set up in the bill, it was averred is unconstitutional and void.

The bill is verified by the complainant, who states:

"The matters and things stated in said bill of complaint are true to my own knowledge, save those matters and things which are stated in said bill to be made upon information and belief and as to those matters and things so stated in said bill of complaint to be made upon information and belief, I am informed and believe the same to be true."

The affidavit further set up that leases to apartments such as those contained in complainant's building were generally made and entered into many months before the apartments were available for occupancy; that at the time of the bill leases were being entered into for possession the next fall; that two of his tenants had recently informed him that when their leases expired they would not renew them; that complainant placed the leases of these apartments in the hands of several real estate agents; that since the picketing several prospective tenants had called at the building and had inspected the apartments and then observing the pickets or being informed that the building was being picketed, had failed and refused to enter into leases to the apartments; that unless the injunction prayed for was granted immediately, without notice, delay might and would ensue in the issuance thereof; that in the meantime the opportunity to lease the apartments might have passed and complainant would be unable to procure tenants for the apartments and they might remain vacant until the next spring or until the fall of 1928; that the wife of one of the tenants had been ill for some time; that the presence of the pickets at the building had greatly intimidated her and made her condition worse; that complainant's wife had just returned from a hospital where she had been under observation,

and furnished with a set of the Standard Insurance Co. of Illinois, Inc. their policies, showing them to be full-paying and in good standing. It was also stated that the bill was approved in unqualified terms.

The bill is verified by the complainant, who states: "The matters and things stated in said bill of complaint are true to my knowledge, save those matters and things which are stated in said bill to be made upon information and belief, and as to those matters and things so stated in said bill I am informed to be true upon information and belief, I am informed and believe the same to be true."

The affidavit further set up that losses to the amount of \$100,000 were contained in complainant's building were generally made and covered under policy which was in force and effect at the time of the fire. That the bill losses were being collected into the possession of the next bill; that two of his tenants had recently informed him that when their losses expired they would not report them; that complainant placed the losses of these tenants in the hands of several real estate agents; that since the complaint was filed the complainant had called on the building and had investigated the apartments and had ascertained the extent of the damage that the building was being repaired, and failed and refused to enter into losses to the apartments; that unless the insurance company was granted immediately, without notice, delay, and until there is no settlement interest; that in the meantime the complainant would be unable to recover the losses of the tenants and that the complainant would be unable to pay the bill of the tenants; that the complainant had been all the time since the fire; that the payment of the bill of the building was being refused; that the complainant was not able to pay the bill of the building; that the complainant was not able to pay the bill of the building; that the complainant was not able to pay the bill of the building.

and was at this time under a doctor's care and in a highly nervous state; that the presence of the pickets had greatly aggravated her condition, and that unless the injunction therein prayed for was granted, the condition of the wife of the tenant and that of complainant's wife might become greatly aggravated and have some permanent and serious effect.

Neither the bill nor the affidavit is, in our opinion, subject to the objection that the facts recited are stated as conclusions. On the contrary, these facts are recited in a way which describes a situation where, assuming the facts stated in the bill to be true, the complainant would undoubtedly be seriously injured not only insofar as the health of his own family and that of the family of his tenant was concerned, but also in his property interests.

It must be remembered that there is no answer to this bill, which is positively verified under oath, (nor has any one of the defendants made any motion in the trial court to dissolve or modify the injunction), and every material fact averred is therefore presumed to be true.

Nor do we think the question of whether the so-called Injunction act (see Laws of Illinois, 1925, p. 378) is constitutional, is in any way involved in the case presented by this bill. The term "peaceful picketing" is a misnomer as applied to a situation where a building used for residential purposes is surrounded and the supplies necessary for the daily sustenance of the occupants intercepted. Therefore this statute is not applicable, nor is the question of whether it is constitutional involved. (Duplex Printing Press Co. v. Deering, 254 U. S. 443; Kinlock Telephone Co. v. Local Union, 275 F. R. 241; Dall Overland Co. v. Willys Overland Inc., 263 F. R. 171; A. J. Monday Co. v. Automobile A. & V. Workers, 177

N. W. 867; Waitress' Union v. Benish Restaurant Co., 5 F. R.
(2nd series) 568.)

This appeal is without merit, and the injunction
order will be affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

U. S. DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT

(Revised 1963)

This manual is intended for use by the following:

1. All personnel who are involved in the management of public lands.

2. All personnel who are involved in the planning and development of public lands.

3. All personnel who are involved in the administration of public lands.

4. All personnel who are involved in the protection of public lands.

5. All personnel who are involved in the research and education of public lands.

6. All personnel who are involved in the interpretation and recreation of public lands.

7. All personnel who are involved in the acquisition and disposal of public lands.

8. All personnel who are involved in the management of public lands.

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23. All personnel who are involved in the management of public lands.

COMMONWEALTH RESERVE FUND, INC.,
a Corporation,
Defendant in Error.

vs.

MARY A. VINCENT et al.,
Plaintiffs in Error.

245 I. A. 635
HARRIS TO CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this writ of error Mary A. Vincent, defendant, brings in review a proceeding brought by complainant to foreclose a chattel mortgage. Pursuant to the report and recommendation of the master, to whom the cause was referred, the decree found that she was indebted to the complainant in the sum of \$6865.41, and the property described in the chattel mortgage was ordered sold to satisfy said indebtedness. The property was sold and an order entered approving the master's report of sale.

The brief of defendant does not comply with our Rule 19, and complainant has not filed a brief in this court. Approximately four hundred pages of the record are not abstracted and some thirty-two exhibits which were introduced as evidence are missing from both the abstract and the record.

As we understand the case, the question involved is whether or not the complainant made a loan of certain money to Mrs. Vincent. If so, it is contended that complainant was not authorized under the laws of Illinois to make loans and therefore the transaction is void. It is further contended that a note for \$1350, executed by Mrs. Vincent to the complainant, was given in payment of a usurious commission on a new loan.

Complainant is a corporation organized under the laws of the State of Illinois, whose object is:

845144885

IT WAS NOTED

RECEIVED BY THE
FEDERAL BUREAU OF INVESTIGATION
U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C.
JAN 11 1934

RE: THE ALLEGEDLY FALSE STATEMENTS OF THE DEFENDANT

By this letter to your Honorable Court, I am, respectfully,
bringing to your attention a statement made by the defendant in his
testimony before the grand jury at Chicago, Illinois, on January 10, 1934,
in which he stated that he had been contacted by a person who offered
him a loan of \$50,000.00, and that he had accepted the offer. The
statement was made in the presence of the grand jury, and the
defendant was asked to explain the statement. He stated that he
was not sure of the exact amount of the loan, but that it was
somewhere between \$50,000.00 and \$100,000.00. He also stated that
he had not received the money, and that he had not given any
information to the person who offered him the loan. The grand jury
found the statement to be false, and the defendant was convicted of
perjury. The defendant has appealed the conviction, and the case is
now before the United States Circuit Court of Appeals for the Seventh
Circuit. The defendant is now in custody of the Federal Bureau of
Investigation, and is being held in the Chicago House of Detention.
I am, respectfully,
Very truly yours,
Special Agent in Charge

"To buy, sell, acquire, exchange, transfer, pledge, mortgage, underwrite, hold, own and generally deal in and with open accounts, notes, commercial paper, stocks, bonds, securities, trade acceptance, debentures, trust receipts, evidences of indebtedness, bills of lading, warehouses, receipts, including personal property, leases, chose in action of every kind and nature; and while the owner thereof, to exercise all the rights and privileges of ownership; and as principal or agent, to carry on the business of dealers in stocks, bonds and commercial paper; and generally to do all the things incidental to the exercise of any and all of the aforesaid purposes, but not to deal in commercial paper in the exercise of the functions of bank discount or engage in the business of loaning money."

Complainant by its amended bill alleged, in substance, that on August 2, 1921, defendant, Mary A. Vincent, entered into a contract with M. C. Hancock for the purchase of all of the furniture and furnishings of a certain rooming house in Chicago for \$1650, and Mary A. Vincent delivered to said M. C. Hancock her promissory notes for the purchase price secured by chattel mortgage on the household goods and leasehold interest; that subsequently the complainant had purchased said contract notes and said chattel mortgage and paid certain amounts in cash to M. C. Hancock and also certain sums for rent, and subsequently paid M. C. Hancock the amounts of the notes which had been signed by defendant; that the total amount of said payments, including expenses, was \$2014.70; that the defendant was unable to pay said notes as they fell due and was unable to meet her obligations under the contract with M. C. Hancock, and that thereupon she executed her thirteen principal promissory notes for \$150 each and one note for \$164.70 with interest at 6%; that said notes were made payable to the order of "myself" and were endorsed and delivered by her to the complainant; that thereafter certain of said notes were paid and others remained unpaid; that afterwards the complainant purchased from Laura E. Lawson the household furnishings of a rooming house in Chicago and paid her therefor the sum of \$500, and thereafter sold the same to Mary A. Vincent for \$550, receiving from her in payment therefor eleven promissory notes for \$50 each, payable

from one to eleven months after date, which notes were to the order of "myself" and endorsed and delivered by said defendant to the complainant; that notes Nos. 1 and 2 of said series were subsequently paid by her, but that the balance of the notes were not paid; that subsequently Mary A. Vincent became further indebted to the complainant in the sum of \$1350, as a balance due for rent on the above described premises and executed her note for this amount and delivered the same to complainant; that said notes have not been paid according to their terms, and complainant seeks the foreclosure of the chattel mortgage given to secure the same.

The report of the master in chancery found that the allegations of complainant's bill were proven substantially as alleged, and recommended a decree accordingly.

The master found that the transaction aforesaid was not a loan by the complainant to Mary A. Vincent, but was within the authority given to the complainant by its charter, and that the acts of the complainant in its dealings with the defendant were not ultra vires. While there is a mass of testimony on the subject and the point is argued earnestly by the attorney for the defendant, we see no substantial reason for disagreeing with the conclusion of the master as to the nature of the transactions. They fall within the terms of the authority given to complainant under its charter and are valid.

There is not sufficient evidence presented to justify us in holding that the note for \$1350 represented a commission. There is a conflict of testimony on this point between Mrs. Vincent and the complainant's president, Becker. There is no presumption that this note was given for a commission; rather the presumption under the circumstances is otherwise. This being so, we must follow the findings of the master in this respect.

Upon the entire record and in view of the omissions

Two one to eleven dollar bills, which were in the
box of "change" and returned and delivered by said defendant to
the complainant; that after Dec. 1 and 2 all notes were
regularly paid by her, but that the balance of the notes were not
paid; that subsequently Mary A. Vincent became further indebted
to the complainant in the sum of \$1100, as a balance due for rent
on the above described premises and executed her note for this
amount and delivered the same to complainant; that said notes have
not been paid according to their terms, and complainant seeks the
recovery of the principal mortgage given to secure the same.
That on the 1st of the month of January 1892, the
allegations of complainant's bill were proven substantially as
alleged, and recommended a decree accordingly.
The master found that the transaction aforesaid was
not a loan by the complainant to Mary A. Vincent, but was within
the authority given to the complainant by its charter, and that
the acts of the complainant in its dealings with the defendant
were not illegal. While there is a want of testimony on the
subject and the point is raised as to the necessity for the
defendant, we see no substantial reason for disagreeing with the
conclusion of the master as to the nature of the transactions.
They fall within the scope of the authority given to complainant
under its charter and are valid.
There is not sufficient evidence presented to justify
it in holding that the note for \$1100 represented a commission.
There is a conflict of testimony on this point between Mr. Vincent
and the complainant's president, Messrs. Barker. There is no presumption
that this note was given for a commission; rather the presumption
under the circumstances is otherwise. The being so, we must fol-
low the findings of the master in this respect.
Upon the entire record and in view of the evidence

of evidence and exhibits in the abstract and record, we are unable to arrive at any satisfactory conclusion that there is reversible error in the decree, and it is therefore affirmed.

AFFIRMED.

Witchett, P. J., and O'Conner, J., concur.

RECEIVED

MAE BELLE CONROYD, as Executrix
of the Last Will and Testament
of Frank Conroyd, Deceased,
Appellee,

vs.

YELLOW CAB COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

In the early morning of February 16, 1923, Frank Conroyd was driving a Diamond taxicab southward on California avenue in Chicago, and when he reached Diversey avenue, an intersecting street running east and west, there was a collision between his cab and a Yellow cab belonging to the defendant, whereby Conroyd received injuries resulting in his death. His executrix brought suit under the Injuries act and upon trial had a verdict and judgment for \$8500. Defendant appeals.

This is the second trial of the case. At the prior trial the court instructed the jury to find for the defendant. On review by this court that judgment was reversed and the cause remanded. 239 Ill. App. 663.

In our opinion then rendered we held that the trial court should have allowed the jury to determine the identity of the Yellow cab involved and also as to which of the two cabs was entitled to the right of way. In our opinion we outlined the pleadings, the general nature of the accident and of the evidence then presented. On the second trial the fact that the Yellow cab involved belonged to the defendant was conceded and its driver testified, giving his version of the collision.

As on the first trial, Hackbarth, the city fireman, on the second trial testified that he was looking out of one of the north windows of the engine house, which is on Diversey about

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436 - 31570

ALL THIS CERTIFICATE, as presented
of the last will and testament
of Frank Conroy, deceased,
appears.

WITNESSES THE COURT,
Appellant.

1. THE COURT HEREBY REVERENDLY RECOMMENDS THE TRIAL OF THE CASE.

In the early morning of February 16, 1933, Frank
Conroy was driving a Diamond Tuxedo northward on California
avenue in Chicago, and when he reached Riverside avenue, an inter-
secting street running east and west, there was a collision be-
tween his car and a Yellow cab belonging to the defendant, whereby
Conroy received injuries resulting in his death. His executor
brought suit under the Illinois act and upon trial had a verdict
and judgment for \$8500. Defendant appeals.

This is the second trial of the case. At the first
trial the court instructed the jury to find for the defendant.
On review by this court that judgment was reversed and the case
remanded. 230 Ill. App. 431.

In our opinion there rendered we held that the trial
court should have allowed the jury to determine the identity of
the Yellow cab involved and also as to which of the two cars was
entitled to the right of way. In our opinion we outlined the
evidence, the general nature of the accident and of the evidence
then presented. On the second trial the fact that the Yellow cab
involved belonged to the defendant was conceded and its driver
testified, giving his version of the collision.
As on the first trial, Macdonald, the city engineer,
on the second trial testified that he was looking out of one of
the north windows of the engine house, which is on Riverside near

165 feet east of the east line of California avenue, and saw the Yellow cab go westward at a speed of about 35 miles an hour until it passed out of his view about 65 feet from California avenue without any change of speed, and that about two seconds thereafter he heard a crash and rushed out and saw the two cabs together at the southwest corner of Diversey and California. This was about 1:30 a. m.

Tempske, a police officer, was at the engine house at the time; he heard the crash and ran towards California avenue and found the cabs in collision. The driver of the Yellow was standing in the middle of the street. The police officer opened the door of the Diamond cab and found Conroyd fatally injured. With the help of a witness, McDermott, who came by on a southbound California avenue street car, they put Conroyd on the street car and he was taken to the police station.

There is a building at the northeast corner of Diversey and California. Brade, the chauffeur for the Yellow cab, testified that he was driving west at about twenty-two miles an hour along the center of Diversey about 1:30 in the morning, with no other traffic on the street; that he had chains on both of his rear wheels and also a chain on one of his front wheels; that as he approached the intersection of California, he slowed up his cab so that he was going about ten miles an hour; that when he reached the building line on the east side of California, he looked north and saw the Diamond cab coming southward about seventy-five feet north of the building line on Diversey. It was coming rapidly until it approached Diversey, and he judged that it was then going thirty or thirty-five miles an hour. He could not apply his brakes suddenly because the streets were icy, but he did apply them in such a way as to slow up his cab and turn to the south to about two miles an hour, when the Diamond cab, coming straight south in the

437 - 1177

100 feet east of the east line of California avenue, and now the Yellow cab went westward at a speed of about 35 miles an hour until it passed out of his view about 65 feet from California avenue without any change of speed, and that about two seconds thereafter he heard a crash and rushed out and saw the two cabs together at the northwest corner of Riverway and California. This was about 1:30 a. m.

Temple, a police officer, was at the engine house at the time; he heard the crash and ran towards California avenue and found the cabs in collision. The driver of the Yellow was standing in the middle of the street. The police officer opened the door of the Diamond cab and found Conroy fatally injured. With the help of a witness, Roberts, who came by on a neighborhood California avenue street car, they put Conroy on the street car and he was taken to the police station.

There is a building at the northeast corner of

Riverway and California. Inside, the chauffeur for the Yellow cab, testified that he was driving west at about twenty-two miles an hour along the center of Riverway about 1:30 in the morning, with no other traffic on the street; that he had chains on both of his rear wheels and also a chain on one of his front wheels; that as he approached the intersection of California, he noticed that his cab so that he was going about ten miles an hour; that when he reached the building line on the east side of California, he looked north and saw the Diamond cab coming southward about seventy-five feet north of the building line on Riverway. It was coming rapidly until it approached Riverway, and he judged that it was then going thirty or thirty-five miles an hour. He could not apply his brakes suddenly because the streets were icy, but he did apply them in such a way as to slow up his cab and turn to the north to about two miles an hour, when the Diamond cab, coming straight south in the

westerly car track, struck the Yellow a glancing blow so that the Yellow cab turned completely around and faced in the northeast direction. He says from the first time he saw the Diamond cab he attempted to stop and let it go by.

It was shown that at the inquest Brade testified that he first saw the Diamond when the Yellow was at the east curb and the Diamond was then fifteen feet north of the north curb of Diversey; also that his Yellow cab was running at the rate of ten or twelve miles an hour up to the time of the accident. In many other details his testimony was shown to be in conflict with his previous testimony.

Having consideration for the varying stories, we conclude that the jury could properly find that the Yellow cab approached California avenue at the rate of about thirty-five miles an hour and that it did not appreciably diminish this rate of speed until shortly before the instant of the collision. Hackbarth's testimony in this respect is the more believable, as it is consistent with other facts and circumstances and the appearance and condition of the respective cabs after the collision.

One of the plaintiff's counts in the declaration alleged that the accident was caused by the failure of the defendant's driver to obey the statute with reference to the right of way. This is the oft cited but too little observed statute which makes it the duty of the driver of a vehicle approaching an intersecting street to give the right of way to another approaching it on his right. (Cahill's Stat., chapter 95a, paragraph 34.) In many cases we have stated the mutual rights and obligations of parties approaching street intersections. Partridge v. Eberstein, 225 Ill. App. 209; McCarthy v. Fadin, 236 Ill. App. 300. We have said that it is the duty of the party having the inferior right to

take some affirmative action either by slowing, stopping or, if need be, by reversing his vehicle, in order to keep out of the other's way.

Upon the evidence before the jury it was amply justified in concluding that the defendant's driver did not observe the rule of the right of way, and that his neglect in this respect was the proximate cause of the accident.

Complaint is made concerning rulings on the evidence, the giving and refusing of instructions and the alleged misconduct of plaintiff's attorney on the trial. There was no substantial error with reference to the instructions or rulings on the evidence. The language of the plaintiff's attorney was perhaps somewhat unrestrained, but not more so than was justified by the facts in the case. Upon the whole record no other verdict than the one rendered would have been reasonable, and slight errors, if any, upon the trial do not require a reversal.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., concurs.

O'Connor, J., specially concurring: I agree with the conclusion reached but not in all that is said in the opinion.
Heidler Co. v. Wilson & Bennett Co., 243 Ill. App.
 89, and cases there cited.

Take some alternative action either by slowing down or by reversing the vehicle, in order to keep out of the way.

Upon the evidence before the jury it was simply justified in concluding that the defendant's driver did not observe the rule of the right of way, and that his negligence in this respect was the proximate cause of the accident.

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in the case. Upon the whole record no other verdict than the one rendered would have been reasonable, and all the errors, if any, were unavailing, and not more so than was justified by the facts and circumstances of the case. The language of the plaintiff's attorney was proper and correct with reference to the instructions or rulings on the evidence.

• Don't be afraid of the dark

and cases there cited.

J. H. KAPLAN, Substituted for
DOCTORS SERVICE CORPS, INC.,
a Corporation,
Defendant in Error,
vs.
SAMUEL SPIZZER,
Plaintiff in Error.

ERROR TO CIRCUIT COURT OF
COOK COUNTY.

MR. JUSTICE McSHEELY DELIVERED THE OPINION OF THE COURT.

Judgment by default for \$111 was entered by a Justice of the Peace in LaGrange, Illinois, against defendant. He appealed to the Circuit court, which ordered the appeal dismissed. By this writ of error defendant seeks the reversal of that order. Plaintiff does not appear in this court.

The record shows that when the case was called for trial defendant's attorney moved that it be continued on the ground that the defendant was out of town, but the court denied the motion and ordered the case held for trial; when it was reached, defendant's motion was renewed and denied; thereupon the attorney for plaintiff stated to the court that the former attorneys for the plaintiff had withdrawn from the case; that he now represented the plaintiff; that he was unfamiliar with the case and would like to have the cause continued. However, the court ordered the defendant to proceed with his case, and when his attorney again suggested that the case be placed on the passed case calendar the court refused and ordered the defendant's appeal dismissed. The next day a stipulation supported by affidavit was presented to the court, wherein both parties agreed that the order dismissing the appeal should be set aside. The court, however, refused to recognize the stipulation.

The order dismissing defendant's appeal was

FROM THE 40 WOLFGANG AND CHRISTIANE THOMAS MUSEUM

The order dismissing defendant's appeal was
The court, however, refused to recognize the stipulation.
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now represented the plaintiff; that he was not willing with the
attorneys for the plaintiff had withdrawn from the case; that he
the attorney for plaintiff stated to the court that the former
presented, defendant's motion was removed and denied; thereupon
the motion and ordered the case held for trial; when it was
evident that the defendant was out of town, but the court denied
first defendant's attorney moved that it be continued on the
The record shows that when the case was called for
that order. Plaintiff does not appear in this court.

erroneously entered. It is the long established rule that on appeal from a justice's court the case stands de novo for trial and the burden is upon the plaintiff to proceed with his case. Defendant may stand mute and compel the plaintiff to prove a cause of action. It has been definitely so held in Langenham v. Stickney, 90 Ill. 361; Michelberger v. Garvin, 7 Ill. App. 129; Brown v. Cook, 37 Ill. App. 608. The appeal had been perfected under the statute and the case stood for trial as any other case on the calendar. It may not have been ready for trial, but that was no ground for dismissing defendant's appeal. If the plaintiff himself was not ready for trial, as was apparently the case, the proper order would have been to dismiss the case, as in any like case called for trial.

After the appeal had been perfected and the case was awaiting trial in the Circuit court, on motion of the plaintiff J. H. Kaplan was substituted for the Doctors Service Corps, Inc., a corporation, as plaintiff. We know of no rule which permits such substitution. In Tongelin v. Knell, 227 Ill. App. 317, it was held that Section 74 of the old Justice of the Peace Act was not repealed by the Act of 1895. This section provided that on appeal from a judgment in the justice's court, the plaintiff in the justice's court shall be the plaintiff on the trial on appeal. Counsel pertinently asks - In which case should the procedendo issue? It could not be in Doctors Service Corps, Inc. v. Spitzer, because by the order of substitution this case ceased to be. And it could not issue in Kaplan v. Spitzer because there is no judgment in such case. It was clearly wrong to substitute Kaplan for the Doctors Service Corps, Inc., as plaintiff. Butler v. Ritter, 38 Ill. App. 189.

Another point is raised touching the proceedings before the Justice of the Peace, but as the trial in the Circuit

...entirely entered. It is the long established rule that on appeal from a Justice's court the case stands as given for trial and the burden is upon the plaintiff to proceed with his case. Defendant may stand upon and demand the plaintiff to prove a cause of action. It has been definitely so held in Wright v. Wright, 111. App. 127; Wright v. Wright, 111. App. 127; Wright v. Wright, 111. App. 127. The appeal has been sustained under the statute and the case stood for trial as was first done on the calendar. It may not have been ready for trial, but that was no ground for dismissing defendant's appeal. If the plaintiff himself was not ready for trial, as was apparently the case, the proper order would have been to dismiss the case, as in any like case called for trial.

After the appeal had been perfected and the case was awaiting trial in the Circuit court, on motion of the plaintiff L. H. Kaplan was substituted for the Boston Service Garage, Inc., a corporation, as plaintiff. We know of no rule which prohibits such substitution. In Tennant v. Knott, 227 Ill. App. 317, it was held that Section 74 of the old Justice of the Peace Act was not repealed by the Act of 1905. This section provided that on appeal from a judgment in the Justice's court, the plaintiff in the Justice's court shall be the plaintiff on the trial on appeal. General pertinently asks - In which case should the procedure be? It could not be in Boston Service Garage, Inc. v. Kaplan, because by the order of substitution this case ceased to be, and it could not issue in Kaplan v. Kaplan because there is no judgment in such case. It was clearly wrong to substitute Kaplan for the Boston Service Garage, Inc., as plaintiff. Kaplan v. Kaplan, 111. App. 127.

Another point is raised touching the proceedings before the Justice of the Peace, but as the trial in the Circuit

court is de novo the regularity of the proceedings before the Justice is not in issue.

For the reasons above indicated the order dismissing the defendant's appeal is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

JULIA PALES,
Defendant in Error.

vs.

WALTER PALES,
Plaintiff in Error.

ERROR TO CIRCUIT COURT OF
COOK COUNTY.

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

By writ of error the defendant, Walter Pales, seeks the reversal of a decree entered in a divorce proceeding. Complainant sought a divorce on the grounds of repeated cruelty and habitual drunkenness, and upon hearing these allegations were sustained. The defendant does not question the decree in this respect.

By an amended bill complainant asserted that certain real estate was held in the name of her husband and that she had worked, earned and saved most of the money which was used in the purchase of the same, and therefore she had a substantial interest in the property, and asked that upon a final hearing it be decreed to her as her sole property.

The decree so found and held that lots 7 and 8, block 2 in Bond's subdivision, of the northeast quarter of Section 23, Township 37 north, Range 13 east of the Third Principal Meridian, situated in the Village of Mount Greenwood, Cook County, Illinois, was the sole property of said Julia Pales, and the interest of said Walter Pales in the same was awarded and decreed to the said Julia Pales, and it was ordered that proper deeds of conveyance be made by Walter Pales within five days of the entry of the decree, and upon his failure to do so, then C. Arch Williams, a master in chancery, was ordered to make such deeds. The defendant questions only that portion of the decree

disposing of the real estate.

The decision of the case presents to us the disposition of a freehold. This court has no jurisdiction to dispose of a freehold. Section 25, chapter 37, Illinois Statutes. Under such circumstances, it is our duty to transfer the cause to the Supreme Court, which is accordingly done. Section 102, chapter 110, Illinois Statutes.

CAUSE TRANSFERRED TO THE SUPREME COURT.

Matchett, P. J., and O'Connor, J., concur.

abstract

245 I.A. 636 #4

6025a
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

FRANKLIN H. BOGGS

Hon. ~~AUGUSTUS XXXX PARTON~~, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On *Aug. 4, 1927*

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

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100-10000-1-100

100-10000-1-100
100-10000-1-100

CHARLES R. LYON and
WILLIAM I. LYON,

Appellees,

-vs-

Appeal from the Circuit

OSCAR RUBIN, MOSES H. RUBIN,
ABRAHAM M. RUBIN, SOL RUBIN and
RUBIN'S DEPARTMENT STORE, a
Corporation,

Court of Lake County.

appellants.

Jett, P. J.

This is a forcible entry and detainer proceeding brought by Charles R. Lyon and William I. Lyon, appellees, against Oscar Rubin, Moses H. Rubin, Abraham M. Rubin, Sol Rubin and Rubin's Department Store, a corporation, appellants, in the Circuit Court of Lake County, for the recovery of the possession of a department store building in Waukegan, Illinois.

Appellants entered into the possession of the department store building under a lease which contained covenants against waste, injury and material alterations thereof. The lease also contained a provision for a renewal, conditioned upon the full and faithful performance of all of the conditions of the lease by the appellants and also the giving of a certain notice in writing by them prior to the expiration of the term provided for in the original lease. The provisions of the lease relative to the right of renewal by the appellants reads as follows:

Clause 2. "At the end of the term of this lease, provided no default has been made by said second parties, said second parties shall have the option of extending and renewing this lease under the same terms and conditions as herein contained, but providing for a rental of Seventy Two Thousand Dollars (\$72,000.) payable in monthly installments of Six Hundred Dollars (\$600.); said extension to be for a period of ten (10) years from the date of the expiration of this demise, but said parties of the second part shall serve said parties of the first part, or either of them, with a written notice of the exercise of said option of renewal not later than one (1) year before the expiration of this demise, and in

CHARLES R. LYON and
WILLIAM I. LYON,

Appellants,

Appeal from the Circuit

Court of Lake County.

JOSEPH RUBIN, MOSES H. RUBIN,
ABRAHAM M. RUBIN, SOL RUBIN and
RUBIN'S DEPARTMENT STORE, a
corporation,
Appellees.

Appellants.

1931, P. 1.

This is a forcible entry and detainer proceeding

brought by Charles R. Lyon and William I. Lyon, appellees, against

Joseph Rubin, Moses H. Rubin, Abraham M. Rubin, Sol Rubin and

Rubin's Department Store, a corporation, appellants, in the Circuit

Court of Lake County, for the recovery of the possession of a

department store building in Waukegan, Illinois.

Appellants entered into the possession of the department

store building under a lease which contained covenants against waste,

injury and material alterations thereof. This lease also contained

a provision for a renewal, conditioned upon the full and faithful

performance of all of the conditions of the lease by the appellants

and also the giving of a certain notice in writing by them prior to

the expiration of the term provided for in the original lease. The

provisions of the lease relative to the right of renewal by the

appellees reads as follows:

Clause 2. "At the end of the term of this lease, provided no default has been made by said second parties, said second parties shall have the option of extending and renewing this lease under the same terms and conditions as herein contained, but providing for a rental of Seventy Two Thousand Dollars (\$72,000.) payable in monthly installments of Six Hundred Dollars (\$600.); said extension to be for a period of ten (10) years from the date of the expiration of this demise, but said parties of the second part shall serve said parties of the first part, or either of them, with a written notice of the exercise of said option of renewal not later than one (1) year before the expiration of this demise, and in

case of the failure of said second parties so to do, the option hereby given shall cease and determine."

Within the time prescribed by said clause 2 of said lease appellants gave written notice to appellees that they would avail themselves of the renewal privilege mentioned in the lease. Appellees thereupon served a written notice upon appellants that they would not renew the lease because of certain defaults and alterations of appellants of the department store building in question, and appellees expressly called the attention of appellants to the provision of the eleventh paragraph of the lease which is as follows:

"Nor shall the receipt of said rent, or any part thereof, or any other act in apparent affirmance of the tenancy operate as a waiver of the right to forfeit this lease and the term hereby granted, for the period still unexpired, for any breach of any of the contents herein."

Appellants made some material alterations. They paid the rent promptly when due. The alterations were known to appellees at the time they received the payments of rent. Appellants do not deny having made material alterations of the building but they insist that appellees with knowledge of such alterations accepted the rent; that their conduct constituted a waiver of the breaches complained of and estopped them from setting up said breaches as a ground for their refusal to renew.

Very exhaustive briefs and arguments have been filed by the appellants in support of their contention that the conduct of appellees in accepting the rent constituted a waiver of the breaches complained of and that such conduct estopped appellees from setting up said breaches as a ground for the refusal to renew.

Owing to the provisions of clause 11 of the lease heretofore set out we do not deem it necessary to discuss the question of waiver as contended for by the appellants. According to our view the parties to this lease had a right to agree that the acceptance of rent should not constitute a waiver of any breach of the contract and in as much as they entered into such an agreement appellants cannot now be heard to say that the mere payment of rent constituted

case of the failure of said second parties so to do, the option hereby given shall cease and determine."

Within the time prescribed by said clause 2 of said lease appellants gave written notice to appellees that they would avail themselves of the renewal privilege mentioned in the lease. Appellees thereupon served a written notice upon appellants that they would not renew the lease because of certain defaults and alterations of appellees of the department store building in question, and appellees expressly called the attention of appellants to the provision of the lease which is as follows:

"Nor shall the receipt of said rent, or any part thereof, or any other act in apparent affirmation of the tenancy operate as a waiver of the right to forfeit this lease and the term hereby granted, for the period still unexpired, for any breach of any of the contents herein."

Appellants made some material alterations. They paid the rent promptly when due. The alterations were known to appellees at the time they received the payments of rent. Appellants do not deny having made material alterations of the building but they insist that appellees with knowledge of such alterations accepted the rent; that their conduct constituted a waiver of the breaches complained of and estopped them from setting up said breaches as a ground for their refusal to renew.

Very exhaustive briefs and arguments have been filed by the appellants in support of their contention that the conduct of appellees in accepting the rent constituted a waiver of the breaches complained of and that such conduct estopped appellees from setting up said breaches as a ground for the refusal to renew.

Owing to the provisions of clause 11 of the lease heretofore set out we do not deem it necessary to discuss the question of waiver as contended for by the appellants. According to our view the parties to this lease had a right to agree that the acceptance of rent should constitute a waiver of any breach of the contract and in as much as they entered into such an agreement appellees cannot now be heard to say that the mere payment of rent constituted

a waiver of their several breaches. The general rule that an acceptance of rent after a known breach waives the right of forfeiture is based upon the theory that by accepting rent the landlord evidences an intention to overlook the breach and waive the forfeiture. But where the contract expressly provides that the acceptance of rent will not be construed by the parties as a waiver of the breach and the right of forfeiture the courts will not apply the general rule above stated but will adhere to the intention of the parties as expressed in their contract.

In volume 35 C.J. 1081 the following rule is announced.

"The right to a renewal or extended term may be conditioned expressly upon definite contingencies and such a provision is binding upon the parties. * * *
* * * Whatever conditions may be imposed by leases of this character must be performed otherwise there will be no renewal or extension".

In volume 18 Am. and Eng. Ency. of Law at page 692 it is said:

"The lessee's right to a renewal is often expressly made conditional on his performing his agreements in the lease, and of course the performance by the lessee of such agreements then becomes a conditional precedent to his right to call for a renewal."

We think this doctrine is supported by the rule announced in Vintaloro vs Pappas et al, 310 Ill. 115 where it is said:

"There is no legal objection to a provision in a lease that the acceptance by the lessor of the amount of the rent each month during the pendency of a suit for possession shall not be a waiver of the right of forfeiture upon which the suit is based nor affect the notice of the suit nor the judgment."

Although the lease does not expressly say that payments may be received for use and occupation instead of rent, yet the principle is the same. There can be no good reason, in our opinion, advanced why the parties to a contract cannot stipulate that mere payment of rent shall not operate as a waiver.

Complaint is made to the giving of instructions on the part of appellees and to the refusal of instructions offered by appellants. Instruction No. 8 given on the part of appellees is

It is the intention of the parties to the contract that the contract shall be binding upon the parties and their heirs and assigns forever. It is the intention of the parties to the contract that the contract shall be binding upon the parties and their heirs and assigns forever. It is the intention of the parties to the contract that the contract shall be binding upon the parties and their heirs and assigns forever.

In volume 35 C.1. 1081 the following rule

1. The right of a renewal is extended to the
 2. earliest date possible after the expiration of the
 3. term of the original license. The renewal shall be
 4. for the same term as the original license.
 5. 6. The renewal shall be for the same term as the
 6. original license.
 7. 7. The renewal shall be for the same term as the
 8. original license.
 9. 8. The renewal shall be for the same term as the
 10. original license.

IT SEEMS TO ME THAT YOU ARE NOT AT ALL SURE OF THE FACTS.

"The lessee's right to a renewal is often expressly made conditional on his performing his covenants in the lease, and of course the performance by the lessee of such covenants then becomes a conditional precedent to his right to call for a renewal."

Walter J. ...

"There is no legal objection to a provision in a lease that the acceptance by the lessor of the rent for the next year shall be deemed an acceptance of the rent for the next year, and that the lessor shall not be a waiver of the right of forfeiture upon written notice of the notice of the rent for the next year."

Although the lease does not expressly say that payments may be received for use and occupation instead of rent, yet the principle is the same. There can be no good reason, in our opinion, why the parties to a contract cannot stipulate that mere

Appellants. Instruction No. 8 given on the part of appellee is part of appellee and to the refusal of instructions offered by appellant. Appellant is made to the giving of instructions on the

particularly objected to. It is as follows:

"The court instructs the jury that if you believe from the preponderance or greater weight of the evidence that between July 1, 1915, and May 31, 1925, the defendants failed to maintain and keep in repair the private telephone system referred to in said lease, then your verdict should be for the plaintiffs, even though the evidence shows that the plaintiffs accepted rent after they had knowledge of such failure, if any."

After an examination of instruction No. 8 together with the facts as disclosed by the record in this proceeding, we are of the opinion that the court did not err in the giving of said instruction. The lease provides that the telephone system should be maintained and kept in repair by appellants. The evidence shows that appellants tore it out and did not thereafter maintain it. This is an undisputed breach against the material alteration provision of the lease and the instruction properly stated the law.

Appellants insist that the court erred in refusing to give refused instruction Nos. 1 and 2 offered by them. We have examined these instructions and we are of the opinion that no error was committed in their refusal.

We have examined the other reasons assigned by appellants for a reversal and have concluded that they are not well taken.

We conclude, therefore, that no reversal ^{ible} ~~error~~ was committed on the trial of this cause and that the judgment of the Circuit Court of Lake County should be affirmed which is accordingly done.

Judgment affirmed.

partially objected to. It is as follows:

"The court instructed the jury that it was
believe from the circumstances in evidence
of the evidence that between July 1, 1915, and
July 31, 1918, the defendant failed to maintain
and keep in repair the private telephone system
connected to its main lines. This was
evidence that the defendant, even though it
evidence shows that the defendant neglected and
after that had knowledge of such failure, it says.

After an examination of instruction No. 8 together with

the facts as disclosed by the record in this proceeding, we are of

the opinion that the court did not err in the giving of said

instruction. The lease provided that the telephone system should

be well maintained and kept in repair by appellants. The evidence shows

that appellants knew it was not in repair and neglected to maintain it.

This is a material fact, and the instruction properly stated the law.

provision of the lease and the instruction properly stated the law.

Instructions which the court gave in reference to

five returned instruction Nos. 1 and 2 offered by them. We have

examined these instructions and we are of the opinion that they

was considered in their refusal.

We have examined the other reasons assigned by appellants

for a reversal and have concluded that they are not sufficient.

We therefore, affirm the judgment of the court.

affirmed on the basis of this cause and that the judgment of the

Circuit Court of Lake County should be affirmed which is accord-

ingly affirmed. Judgment affirmed.

Judgment affirmed.

Reversed and remanded.

To preserve 1. The

was not

the case was

that the court

the court

of the court

the court

STATE OF ILLINOIS,
SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the _____

opinion

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 5th day of
Aug. in the year of our Lord one thousand
nine hundred and twenty-seven

Justus L. Johnson
Clerk of the Appellate Court

11th Nov 1911

and secondly that the Secretary of the Society of Friends of the British Museum is the only person who is not a member of the Society of Friends of the British Museum.

and also that the Secretary of the Society of Friends of the British Museum is the only person who is not a member of the Society of Friends of the British Museum.

X

11th Nov 1911

abstract

245 I.A. 637 #1

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. ~~AUGUSTUS L. JOHNSON~~ FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On *Aug. 4, 1927*

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

1917

AT A TERM OF THE ARIZONA COURT

The fifth day of April, 1917
forred and twenty-second

AS M. JETT, Justice

Justice

Justice

JUSTICE D. JOHNSON, Clerk

FLOYD S. CLARK, Sheriff

that defendant, hereby
the opinion of the
court

EDWIN F. LAWRENCE,
et al,

Appellants,

-vs-

Appeal from the Circuit
Court of Whiteside County.

LELIA S. WOLFERSPERGER,
Executrix of the Last Will
and Testament of AARON A.
WOLFERSPERGER, deceased, et al,

Appellees.

Jett, P. J.

This appeal involves the question of priorities among numerous creditors who have filed claims against the Estate of Aaron A. Wolfersperger, deceased.

Aaron A. Wolfersperger was an attorney in the firm of Wolfersperger and Stager who practiced their profession at Sterling, Illinois. Wolfersperger also did an extensive business as a loan broker.

Lelia S. Wolfersperger is the executrix of the Will of the said Aaron A. Wolfersperger, deceased, and his surviving partner John M. Stager is the attorney for the estate.

It appears that Wolfersperger in his lifetime was guilty of various frauds in his dealings as a broker with his clients and in the lending of money to them. Many of the claims filed against the estate were for money due from Wolfersperger as a result of his dishonest transactions. An examination of the numerous claims filed shows a variety of transactions and they may be divided into three groups; the investors who merely left their funds with Wolfersperger and took his personal note at a specified rate of interest without security; those who bought notes secured by mortgages but did not take the securities with them and ultimately either found there was no such loan in ex-

EDWIN F. JAVIER,
et al.

Appellants,

-vs-

Appeal from the Circuit
Court of Whiteside County.

LEILA S. WOLFENBERGER,
Executrix of the Last Will
and Testament of ARON A.
WOLFENBERGER, deceased, et al.,

Appellees.

Left, P. 1.

This appeal involves the question of priorities among numerous creditors who have filed claims against the Estate of Aron A. Wolfenberger, deceased. Aron A. Wolfenberger was an attorney in the firm of Wolfenberger and Stager who practiced their profession at Sterling, Illinois. Wolfenberger also did an extensive business as a loan broker.

Leila S. Wolfenberger is the executrix of the Will of the said Aron A. Wolfenberger, deceased, and his surviving partner John M. Stager is the attorney for the estate.

It appears that Wolfenberger in his lifetime was guilty of various frauds in his dealings as a broker with his clients and in the lending of money to them. Many of the claims filed against the estate were for money due from Wolfenberger as a result of his dishonest transactions. An examination of the numerous claims filed shows a variety of transactions and they may be divided into three groups; the investors who merely left their funds with Wolfenberger and took his personal note at a specified rate of interest without security; those who bought notes secured by mortgages but did not take the securities with them and ultimately either found there was no such loan in ex-

istence or that several parties had bought the same mortgage or that the borrower had paid off the loan and Wolfersperger had converted the money to his own use instead of satisfying the obligations; other claimants are the borrowers who went to Wolfersperger and paid off their obligations but without securing the cancellation of their notes or the release of their mortgages and now find them held by other parties who claim the right to collect again.

A number of appellants claims were presented to Stager and he made out the statement of the claim to be filed in the County Court. The claims of appellants presented to other attorneys and prepared by them were handed to Stager. He endorsed on the claims of appellants the notation that they should be allowed as of the fifth class. The blank form consent to allowance and classification was then signed by the executrix. The claims were forwarded to the county clerk at Morrison with the request that they be presented to the County Judge. When they were so presented the County Judge was in doubt about the correctness of the classification and after some communications with Stager the claims were allowed as of the fifth class "subject to re-classification". Later, at a subsequent term a large number of other claims were filed and allowed as of the sixth class and when these latter claims were presented attorneys representing said claimants made objections to the classification of the claims of appellants and filed petitions for a re-classification. Upon a hearing appellants claims were re-classified as of the sixth class and an appeal was prosecuted to the Circuit Court where the order of re-classification was affirmed. Appellants have prosecuted a further appeal to this court.

It is the contention of appellants that the classification of the fifth class is a final and irrevocable order of the County Court which can be reviewed only upon appeal and cannot

It is the contention of appellants that the classification of the fifth class is a final and irrevocable order of the County Court which can be reviewed only upon appeal and cannot be reviewed by the Circuit Court. Upon a hearing appellants claims were re-classified as of the sixth class and an appeal was prosecuted to the Circuit Court where the order of re-classification was affirmed. Appellants said claimants made objections to the classification of the sixth class and filed petitions for a re-classification. When these latter claims were presented attorneys representing appellants were allowed as of the fifth class and allowed as of the sixth class. The classification was then signed by the executrix. The claims and classification were then signed by the executrix. The claims were forwarded to the county clerk at Morrison with the request that they be presented to the County Judge. Then they were no presented the County Judge was in doubt about the correctness of the classification and after some communications with Stager the claims were allowed as of the fifth class "and not to re-classification". Later, at a subsequent term a large number of other claims were filed and allowed as of the sixth class and appellants made objections to the classification of the sixth class and filed petitions for a re-classification. Upon a hearing appellants claims were re-classified as of the sixth class and an appeal was prosecuted to the Circuit Court where the order of re-classification was affirmed. Appellants have prosecuted a further appeal to this court.

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Stager and the borrower had paid off the loan and Wolfersberger had conveyed the money to his own use instead of satisfying the obligations; other claimants are the borrowers who went to Wolfersberger and paid off their obligations but without securing the cancellation of their notes or the release of their mortgages and now claim them held by other parties who claim the right to collect a claim of \$1000. A number of appellants claims were presented to Stager and he made out the statement of the claim to be filed in the County Court. The claims of appellants presented to other attorneys and prepared by them were handed to Stager. He endorsed on the claims of appellants the notation that they should be allowed as of the fifth class. The blank form consent to allowance and classification was then signed by the executrix. The claims were forwarded to the county clerk at Morrison with the request that they be presented to the County Judge. Then they were no presented the County Judge was in doubt about the correctness of the classification and after some communications with Stager the claims were allowed as of the fifth class "and not to re-classification". Later, at a subsequent term a large number of other claims were filed and allowed as of the sixth class and appellants made objections to the classification of the sixth class and filed petitions for a re-classification. Upon a hearing appellants claims were re-classified as of the sixth class and an appeal was prosecuted to the Circuit Court where the order of re-classification was affirmed. Appellants have prosecuted a further appeal to this court.

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be amended or changed by the County Court at a subsequent term. It is insisted by appellees that the order was an interlocutory one; that it was procured by fraud and that it was entered with the understanding the classification might be definitely determined after the year for filing claims had elapsed. It is also claimed that the appeal to the Circuit Court was not properly effected and that this appeal should be dismissed.

After an examination of the record we take a different view from that advanced by either appellants or appellees. There is no question that appellants claims do not belong to the fifth class. The record does not show that the classification was the result of fraud. The County Judge had some doubt about the proper classification as shown by the communications he had with the attorney representing the executrix of the estate of the deceased. There may have been a mistake of law but there was no mistake as to fact. If the order of the County Court is final then this case must be reversed. From what is disclosed by the record we are of the opinion the court entered a conditional judgment of the classification. That is to say the claims were allowed as of the fifth class provided such classification was not thereafter changed. In our opinion this phraseology does not make the judgments of allowance interlocutory. The claims were definitely allowed for a specified amount. The only uncertainty about the judgments is in the classification of the claims. So much of the order which pertains to classification is a nullity and there was in fact no classification made.

In *McCall et al v. Lee*, 120 Ill. 261, it is held that it is not reversible error for a court to fail to make a classification. At page 266 the court among other things said:-

"It is said, that the judgment of the Circuit Court is erroneous in not determining the class, to which appellee's claim belongs, in accordance with Section 70 of chapter 3 of the Revised Statutes. The Circuit Court undoubtedly has the right to direct the classification of claims, (*Darling et al. v. McDonald*, 101 Ill. 370,) but we do not think, that the failure to do so, in this case, makes the judgment erroneous. The statute itself fixes the class, to which the claim

be a matter of course in the Court of Appeals.

It is insisted by appellees that the case was an error.

that it was presented by them, and that it was entered with

the case, but the classification might be definitely determined

after the year for filing claims had elapsed. It is also claimed

that the appeal to the Circuit Court was not properly effected and

that this appeal should be dismissed.

After an examination of the record we take a different

view of the facts advanced by either appellants or appellees. There

is no question that appellees' claim is the one which

class. The record does not show that the classification was the

result of fraud. The County Judge had some doubt about the proper

classification as shown by the communications he had with the

attorney representing the executor of the estate of the deceased.

There may have been a mistake of law but there was no mistake as

to fact. If the order of the County Court is final then this case

must be reversed. From what is disclosed by the record we are of

the opinion the court entered a conditional judgment of the

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As in *McCall et al. v. Lee*, 120 Ill. 261, it is held that

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cation. At page 266 the court among other things said:

"It is said, that the judgment of the Circuit Court is erroneous in not determining the class, to which appellee's claim belongs, in accordance with Section 70 of chapter 3 of the Revised Statutes. The Circuit Court undoubtedly has the right to direct the classification of claims, (see *McCall et al. v. McDonald*, 101 Ill. 270,) but we do not think that the failure to do so, in this case, makes the judgment erroneous. The statute itself fixes the class, to which the claim

belongs, and the direction, that it be paid in the 'due course of administration," means, that it shall be paid as, and pro rata with, other claims of that class, out of the assets administered."

There is nothing in the record to show that the claims of appellants belong to the fifth class, and the stipulation that the monies were not held by the decedent either as an express or as a technical trust, and all the other matters shown by the record lead to the conclusion that the claims should have been placed in the sixth class according to the order of the County Court of Whiteside County.

In view of our conclusion it is unnecessary to discuss the sufficiency of the appeal from the County Court to the Circuit Court.

The judgment of the Circuit Court is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT }ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the _____

opinion

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 5th day of
aug. in the year of our Lord one thousand
nine hundred and twenty-seven

Justus L. Johnson
Clerk of the Appellate Court

6064a 768
245 I.A. 637 #2

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

FRANKLIN H. BOGGS

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 29 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Page 10

1880

1881

Presented

Clark's

Following

People of the State of Illinois)

Defendant in Error,)

-vs-)

Fred L. Rupel,)

Plaintiff in Error.)

Error to The

County Court of Du Page

County, Illinois.

Jett, P. J.

The State's Attorney of Du Page County filed an information against Fred L. Rupel, Plaintiff in error, and Martha Rupel, consisting of thirteen counts, in which he charged the said Fred L. Rupel and Martha Rupel with violations of the Illinois Prohibition Act.

All of the counts of the information, with the exception of the first and seventh, were nolle before the trial. The cause was tried upon the first and seventh counts. The first count charges the unlawful sale of intoxicating liquor and the seventh count charges the unlawful possession of intoxicating liquor. A plea of not guilty was entered by the said Fred L. Rupel, and Martha Rupel. A jury trial was had and a verdict returned finding Fred L. Rupel, plaintiff in error guilty and finding Martha Rupel not guilty. Motions for a new trial and in arrest of judgment were over-ruled and a fine of \$200 was imposed under the first count and a fine of \$100 under the seventh count.

To reverse the judgment this writ of error is prosecuted by Fred L. Rupel, the plaintiff in error. A number of reasons are assigned by the plaintiff in error for a reversal of the judgment.

County Court of Du Page
County, Illinois.
Error to The

People of the State of Illinois
Defendant in Error,

--vs--

Fred L. Rubel,
Plaintiff in Error.

1911, P. 1.

The State's Attorney of Du Page County filed an information against Fred L. Rubel, Plaintiff in error, and Martha Rubel, consisting of thirteen counts, in which he charged the said Fred L. Rubel and Martha Rubel with violations of the Illinois Prohibition Act.

All of the counts of the information, with the exception of the first and seventh, were nolle before the trial. The cause was tried upon the first and seventh counts. The first count charges the unlawful sale of intoxicating liquor and the seventh count charges the unlawful possession of intoxicating liquor. A plea of not guilty was entered by the said Fred L. Rubel, and Martha Rubel. A jury trial was had and a verdict returned finding Fred L. Rubel, Plaintiff in error guilty and finding Martha Rubel not guilty. Motions for a new trial and in arrest of judgment were over-ruled and a fine of \$200 was imposed upon the first count and a fine of \$100 under the seventh count.

To reverse the judgment this writ of error is prosecuted by Fred L. Rubel, the plaintiff in error. A number of reasons are assigned by the plaintiff in error for a

reversal of the judgment.

The record discloses that on the first day of May, 1926, John Murphy, a truck driver, stopped at a hotel occupied and operated by plaintiff in error in the City of Wheaton in Du Page County, Illinois, and asked plaintiff in error if he could get him a pint of whiskey. Plaintiff in error inquired of Murphy when he wanted it and Murphy arranged to come back that night to get it. At about 7:30 o'clock that evening Murphy returned to the hotel and asked plaintiff in error if he had the whiskey. Murphy was told, by plaintiff in error, to walk back to the washroom where he would give it to him. The washroom was up a narrow hallway in the same building. Murphy waited in the washroom a short time and then plaintiff in error came in and gave him a pint bottle of whiskey, whereupon Murphy paid plaintiff in error with a five dollar bill and received three one-dollar bills back as change. The change was paid by plaintiff in error from the cash register in the main room of the hotel. Murphy took the bottle containing the whiskey and delivered the same to Chief of Police Sullivan of Wheaton who labelled it and placed it in a locker in his office.

Murphy is corroborated by Sullivan. Sullivan testified, among other things, that he knew John Murphy and saw him on the evening of May 1st, 1926; that he was a truck driver, that at about 7:30 o'clock on that evening Murphy brought him a bottle of whiskey, the bottle of whiskey being the one offered in evidence. Sullivan identified the bottle of whiskey as the one that was delivered to him by Murphy on the evening in question and identified it as the one that was put away by him after it was delivered to him by Murphy.

It appears that on May 4, 1926 a complaint was filed and a search warrant was issued commanding that the

The record discloses that on the first day of May, 1936, John Murphy, a truck driver, stopped at a hotel owned and operated by plaintiff in error in the City of Weston in Du Page County, Illinois, and asked plaintiff in error if he could get him a pint of whiskey. Plaintiff in error informed of Murphy when he wanted it and Murphy arranged to come back that night to get it. At about 7:30 o'clock that evening Murphy returned to the hotel and asked plaintiff in error if he had the whiskey. Murphy was told by plaintiff in error, to walk back to the washroom where he would give it to him. The washroom was up a narrow hallway in the same building. Murphy waited in the washroom a short time and then plaintiff in error came in and gave him a pint bottle of whiskey, whereupon Murphy paid plaintiff in error with a five dollar bill and received three one-dollar bills back as change. The change was paid by plaintiff in error from the cash register in the main room of the hotel. Murphy took the bottle containing the whiskey and delivered the same to Chief of Police Sullivan of Weston who labeled it and placed it in a room in his office.

John Murphy is corroborated by Sullivan. Sullivan testified, among other things, that he knew John Murphy and saw him on the evening of May 1st, 1936; that he was a truck driver, that at about 7:30 o'clock on that evening Murphy brought him a bottle of whiskey, the bottle of whiskey being the one offered in evidence. Sullivan identified the bottle of whiskey as the one that was delivered to him by Murphy on the evening in question and identified it as the one that was put away by him after it was delivered to him by Murphy.

It appears that on May 4, 1936 a complaint was filed and a search warrant was issued commanding that the

Sheriff of said county search the premises of plaintiff in error. The record further discloses that on the fifth day of May, 1926, at about nine o'clock in the evening, the officers raided the premises of the plaintiff in error and seized certain intoxicating liquors, vessels and containers described in the return of the search warrant as "¹/₂ pint imitation brandy, 1 pint bottle containing ¹/₂ pint of whiskey, 1 empty two-quart bottle, 1 empty gin bottle." The evidence shows that during the progress of the search one of the raiders, namely, McDonnell, had a conversation with plaintiff in error, in which plaintiff in error informed McDonnell that the "stuff had been dumped out by his wife as soon as the officers came in"; when asked by McDonnell as to what had been dumped out plaintiff in error replied "just a little moon." Plaintiff in error also said to the officers "there is a little gin down there also."

The bottles, containers and liquor seized by the raiding party were taken to the sheriff's office. The record discloses that the contents of the bottles obtained on the raid and also of the bottle Murphy purchased from plaintiff in error, were analyzed by a chemist and that the analysis disclosed that the bottle of whiskey purchased by Murphy contained 22.4% of alcohol by volume. The contents of two of the bottles taken in the raid disclosed that they contained 32.7% and 31.3% of alcohol by volume respectively. The chemist testified that the three exhibits, being the bottle purchased from plaintiff in error by Murphy and the two taken in the raid, were diluted whiskey and were intoxicating.

The only evidence offered by the plaintiff in error was the complaint for the search warrant, the warrant and the proceedings before the Justice of the Peace and the testimony of the witness, Edward L. Karas, who testified that he had

... to all ... search ... the first day of ... further losses that on the first day of ... at about nine o'clock in the evening, the officers ... premises of the plaintiff in error and seized ... vessels and containers described ... the return of the search warrant as " ... initiation promptly ... pint bottle containing $\frac{1}{2}$ pint of whiskey, 1 empty two-ounce bottle, 1 empty gin bottle." The evidence shows that during the ... of the search one of the officers, namely, McDonnell, ... conversation with plaintiff in error, in which plaintiff ... that the " ... had been dumped out ... as the officers came in"; when asked by ... as to what had been dumped out plaintiff in error ... "just a little moon." Plaintiff in error also said ... "there is a little gin down there also." ... The bottle, ... and liquor seized by the ... party were taken to the sheriff's ... The record ... contents of the bottles obtained on the ... of the bottle Murphy purchased from plaintiff ... error, who analyzed by a chemist and that the analysis ... that the bottle of whiskey purchased by Murphy ... contained 22.4% of alcohol by volume. The contents of two ... bottles taken in the raid disclosed that they contained ... and 31.3% of alcohol by volume respectively. The ... from plaintiff in error by Murphy and the two taken ... were diluted whiskey and were intoxicating. ... The only evidence offered by the plaintiff in error ... the complaint for the search warrant, the warrant and the ... the justice of the peace and the testimony ... of the witness, Edward J. ... who testified that he had

known the plaintiff in error and Mrs. Rupel about two and one-half years and that their general reputation as peaceful and law-abiding people in the community was good.

It is the contention of the plaintiff in error that it should have been alleged in the information that the liquors charged to have been sold and possessed by the plaintiff in error were fit for beverage purposes and that, if it was necessary to so charge it followed that it should be proven. The rule is, as we understand it, that a count in an indictment charging unlawful possession of intoxicating liquor for the purpose of sale, need not allege that the liquor was fit for beverage purposes as the term "intoxicating liquor" signifies that it is potable and fit for beverage purposes. The People of the State of Illinois vs. Cioppi, et al., 322 Ill. 353.

A charge of violation of the Prohibition Act, in the possession and sale of intoxicating liquor need not specify the kind of liquor sold nor allege that it was fit for use as a beverage as the statute has defined the term "intoxicating liquor" and a defendant so charged with violation of the statute is sufficiently informed of the nature of the charge. The People of the State of Illinois vs. Alfano, 322 Ill. 384.

We are of the opinion that it was not incumbent upon the prosecution to allege that the intoxicating liquor was fit for beverage purposes. If it was not required of the people to so allege it in the information, it necessarily follows that they were not required to make that proof.

It is contended by the plaintiff in error that the court erred in admitting the evidence taken by virtue of the search warrant, for the reason that the search warrant was not a valid one. No motion was made to quash the writ or have the evidence taken by virtue of the search warrant

knows the plaintiff in error and Mrs. Vogel about two and
one-half years and that their general reputation as peaceful
and law-abiding people in the community was good.

It is the contention of the plaintiff in error
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purposes and that, if it was
necessary to so charge it followed that it should be proven
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that it is potable and fit for beverage purposes. The People
of the State of Illinois vs. Clapp, et al., 382 Ill. 588.

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for use as a beverage as the statute has defined the term
"intoxicating liquor" and a defendant so charged with violation
of the statute is sufficiently informed of the nature of the
charge. The People of the State of Illinois vs. Adams.

We are of the opinion that it was not incumbent
upon the prosecution to allege that the intoxicating liquor
was fit for beverage purposes. That it was not alleged of
the people to so allege it in the information, it necessarily
follows that they were not required to make that proof.

It is contended by the plaintiff in error that
the court erred in admitting the evidence taken by virtue of
the search warrant, for the reason that the search warrant
was not a valid one. No motion was made to quash the writ
or have the evidence taken by virtue of the search warrant

impounded. Neither is he in a position to question the admissibility of the evidence taken under the search warrant. It is insisted that the evidence does not show guilty intent in connection with the possession of the liquors in question. It was a question of fact for the jury to determine whether or not the plaintiff in error was guilty or not guilty of the charges alleged against him in the information. If the jury believed the testimony offered on the part of the prosecution they were authorized to return the verdict they did.

Plaintiff in error insists that the verdict returned by the jury was faulty in that it did not specify each count on which the conviction was based. Our attention has been called to a number of authorities bearing on this alleged error. We have examined them and they are not in point and cannot be relied upon as sustaining the position of plaintiff in error under the facts in this cause.

It will be remembered that the original information consisted of thirteen counts; with the exception of the first and seventh, they were nolle by the state's attorney before the trial. The jury returned the following verdict: "We, the jury, find the defendant, Fred L. Rupel, guilty in the manner and form as charged in each and all of the counts of the information herein." Since there were only two counts in the information, the first and seventh, the finding of the jury is an intelligent one and was broad enough to include and did include each of the two counts in the information on which the trial was had.

It was insisted that the court erred in refusing to give the following instruction offered by the plaintiff in error: "If the jury believe from the evidence in this case that defendants, prior to the date mentioned in the information,

important. Neither is he in a position to question the admissibility of the evidence taken under the search warrant. It is stated that the evidence does not show guilty intent in connection with the possession of the liquor in question. It was a question of fact for the jury to determine whether or not the plaintiff in error was guilty or not guilty of the charges alleged against him in the information. If the jury believed the testimony offered on the part of the prosecution they were authorized to return the verdict they did. Plaintiff in error insists that the verdict returned by the jury was faulty in that it did not specify each count on which the conviction was based. Our attention has been called to a number of authorities bearing on this alleged error. We have examined them and they are not in point and cannot be relied upon as sustaining the position of plaintiff in error under the facts in this cause. It will be remembered that the original information consisted of thirteen counts; with the exception of the first and seventh, they were nolle by the state's attorney before the trial. The jury returned the following verdict: "We, the jury, find the defendant, Fred L. Rupe, guilty in the manner and form as charged in each and all of the counts in the information herein." Since there were only two counts in the information, the first and seventh, the finding of the jury is an intelligent one and was broad enough to include and did include each of the two counts in the information on which the trial was had.

It was insisted that the court erred in refusing to give the following instruction offered by the plaintiff in error: "If the jury believe from the evidence in this case that defendants, prior to the date mentioned in the information,

bore among their neighbors and with the people among whom they were acquainted, a good reputation as peaceful and law-abiding citizens, then they are instructed that such good character and reputation is proper for the consideration of the jury in determining the guilt or innocence of the defendants, and in a case where proof of the defendants' guilt is not clear, such evidence of good character should generate a doubt in the minds of the jury of the defendants' guilt."

The instruction as offered told the jury that good character and reputation was proper for consideration of the jury in determining the guilt or innocence of the defendants, and in a case where proof of the defendants' guilt was not clear, such evidence of good character should generate a doubt in the minds of the jury of the defendants' guilt. We are of the opinion that the instruction was erroneous, and that it did not announce a correct rule. In *People vs. Fisher*, 295 Ill. 250, the court, in discussing a similar instruction said: "Such reputation neither tends to prove guilt or innocence, but is proper evidence to be considered by the jury and may be sufficient to raise a reasonable doubt of a defendant's guilt when charged with crime." The instruction is objectionable in that it invaded the province of the jury by informing them that such evidence should generate doubt in the minds of the jury. We think the instruction was properly refused by the court.

It is urged by the plaintiff in error that he did not have a fair and impartial trial as evidenced by certain observations from the bench by the court. The remarks complained of were made by the court after the verdict had been returned by the jury and after the motions for a new trial and in arrest of judgment had been denied. We are unable to agree with counsel

have among their neighbors and with the people among whom they
were acquainted, a good reputation as peaceful and law-abiding
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and reputation is proper for the consideration of the jury in
determining the guilt or innocence of the defendants, and in a
case where proof of the defendants' guilt is not clear, such
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that it did not announce a correct rule. In *People vs. Fisher*,
215 Ill. 250, the court, in discussing a similar instruction
said: "Such reputation neither tends to prove guilt or
innocence, but is proper evidence to be considered by the jury
and may be sufficient to raise a reasonable doubt of a defend-
ant's guilt when charged with crime." The instruction is
questionable in that it invaded the province of the jury by
informing them that such evidence should generate doubt in the
minds of the jury. We think the instruction was properly
reversed by the court.

It is urged by the plaintiff in error that he did not
have a fair and impartial trial as evidenced by certain
observations from the bench by the court. The remarks complained
of were made by the court after the verdict had been returned
by the jury and after the motions for a new trial and in arrest
of judgment had been denied. We are unable to agree with counsel

for plaintiff in error that the remarks of the court complained of, which were made after the trial was had and after the motions for a new trial and in arrest of judgment had been over-ruled, prejudiced him in any way. The court assessed a penalty under each of the counts of which the plaintiff in error was found guilty. The fines aggregate \$300. The fact that the defendant, being fined upon two counts, was fined only \$300 in the aggregate, is evidence of the fact that the court was not prejudiced against the plaintiff in error. The remarks of the trial judge, while not complimentary to the plaintiff in error, evidently were not reflected in his actions, as a trial judge when imposing a penalty. Taking the case as a whole as made by the prosecution, we are of the opinion that the people proved a case and the jury was authorized under the evidence to make the finding that they did.

No reversible error appearing, the judgment of the county court of Du Page county will be affirmed, which is accordingly done.

Judgment Affirmed.

for plaintiff in error that the remarks of the court complained of, which were made after the trial was had and after the motion for a new trial and in arrest of judgment had been over-ruled, prejudiced him in any way. The court assessed a penalty under each of the counts of which the plaintiff in error was found guilty, the fines aggregate \$800. The fact that the defendant, being fined upon two counts, was fined only \$300 in the aggregate, is evidence of the fact that the court was not prejudiced against the plaintiff in error. The remarks of the trial judge, while not complimentary to the plaintiff in error, evidently were not reflected in his actions, as a trial judge when imposing a penalty. Taking the case as a whole as made by the prosecution, we are of the opinion that the people proved a case and the jury was authorized under the evidence to make the finding that they did.

No reversible error appearing, the judgment of the court is affirmed and the case is remanded to the county court of Du Page county with the usual costs.

Respectfully,
J. Edgar Hoover

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

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The first of the two
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MUSEUM
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ART
AND
ARCHAEOLOGY
OF
THE
UNIVERSITY
OF
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245 I.A. 637 #3

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

FRANKLIN H. BOGGS

Hon. ~~AUGUSTUS A. PARFLOW~~, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 29 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

AT A TERM OF THE SUPREME COURT

held at Ottawa, on Tuesday, the fifth day of April, 1901, of one Lord one thousand nine hundred and twenty-seven
the District of the State of Illinois

Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice

FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

On the fifth day of April, 1901, the opinion of the Court was delivered in the
office of said Court, in the words and figures

April Term 1927.

The County of Whiteside, a Body
Politie and Corporate, in the
State of Illinois,

Appellant.

-vs-

The County of Lee, a Body Politie
and Corporate, in the State of
Illinois,

Appellee.

Appeal from the
Circuit Court of Lee
County.

Jett, P. J.

This is a suit instituted by Whiteside County, appellant, against Lee County, appellee, to recover from Lee County a Proportionate share of the money laid out and expended by the appellant in repairing and painting the Howland Creek Bridge which constitutes a part of a public highway alleged to be within eighty rods of the county line which divides the counties of appellant and appellee. The declaration consists of one count and is as follows:

"First Amended Declaration sets forth that the Howland Creek Bridge was located in Whiteside county and that it was necessary to repair the bridge by painting the steel, removing the old plank floor, furnishing and installing a new three-inch creosoted pine floor, with an asphalt paint coat wearing surface; that Lee County was properly notified of the necessity of such repairs and requested to pay its proportionate share of the expenses; that Lee County refused to pay its proportionate share; that Howland Creek Bridge is on a road used as a public highway within eighty (80) rods of the County line in Whiteside County that divides the political subdivision of the County of Whiteside from the County of Lee; that the statutory laws of the State of Illinois as set forth in Chapter 121, Paragraph 41, of the Smith-Hurd Illinois Revised Statute, states that the bridges and culverts on roads on county lines and on roads within eighty

April Term 1927.

Appeal from the
Circuit Court of Lee
County.

The County of Whiteside, a Body
Political and Corporate, in the
State of Illinois,

Appellant.

-vs-

The County of Lee, a Body Political
and Corporate, in the State of
Illinois,

Appellee.

Let it be

This is a writ instituted by Whiteside County, appellant,
against Lee County, appellee, to recover from Lee County a pro-
portionate share of the money laid out and expended by the appel-
lant in repairing and painting the Howland Creek Bridge which
constitutes a part of a public highway alleged to be within
eighty rods of the county line which divides the counties of
appellant and appellee. The declaration consists of one count
and is as follows:

"First Amended Declaration sets forth that
the Howland Creek Bridge was located in White-
side County and that it was necessary to repair the
bridge by painting the steel, removing the old
plank floor, furnishing and installing a new
three-inch creosoted pine floor, with an asphalt
paint coat wearing surface; that Lee County was
properly notified of the necessity of such
repairs and requested to pay its proportionate share
of the expenses; that Lee County refused to pay
its proportionate share; that Howland Creek
Bridge is on a road used as a public highway
within eighty (80) rods of the County line in
Whiteside County that divides the political
jurisdiction of the County of Whiteside from the
County of Lee; that the statutory laws of the
State of Illinois as set forth in Chapter 121,
Paragraph 41, of the Smith-Hurd Illinois Revised
Statute, states that the bridges and culverts on
roads on county lines and on roads within eighty

(80) rods of county lines shall be built and repaired by such Counties, and the expenses of such construction and repair shall be borne in proportion to the assessed value of the property, real and personal, in the respective counties according to the latest preceding equalized assessment thereof prior to such construction or repairs; that the construction and repairs on the Bridge were reasonable in kind and cost; that Lee County refused to make the repairs or pay its proportionate share of the expense of construction and repairs; that the total cost of making the repairs was Eight Hundred Sixty-Seven and 50-100 Dollars (\$867.50); that forty-nine (49) per cent should be paid by Whiteside County and fifty-one (51) per cent should be paid by Lee County; that Whiteside County repaired said bridge and paid for the same; that a statement of expenses was submitted to the County of Lee and request made for payment; that the County of Lee failed and refused to pay its proportionate share of such expenses and still does refuse, therefore it brings its suit."

To the declaration the appellee pleaded the general issue. The trial was had by the court without the intervention of a jury, and a finding had in favor of appellee and this appeal followed.

It appears from the record that Whiteside County and Lee County, adjoin, Whiteside County being west of Lee County. There is a public highway, a portion of which is wholly within Whiteside County, in which portion of the highway there is a bridge known as the Howland Creek Bridge. It became in need of repairs. Lee County was notified of the necessity of such repairs and requested to pay a proportionate share of the expense. Lee County refused to pay a proportionate share. The repairs were made at an expense of \$867.50, and in view of the taxable property in each of the counties, it is the contention of Whiteside County that it should pay only forty-nine per cent of the cost of said repairs and that fifty-one percent should be paid by Lee County. The record further discloses that after Whiteside County had repaired said bridge and paid for the same a statement of the expenses was submitted to Lee County and a

request made for payment; that the said County of Lee refused and failed to pay any portion of the expense and the result was the institution of this proceeding.

The result of this suit depends upon the construction to be placed on Paragraph 41, Chapter 121, Smith-Hurd Statutes, which reads as follows:

"Bridges or culverts on roads on county lines, and bridges or culverts on roads within eighty rods of county lines shall be built and repaired by such counties and the expense of such construction and repair shall be borne in proportion to the assessed value of the property, real and personal, in the respective counties according to the last preceding equalized assessment thereof prior to such construction or repair.

And when any county desires to construct or repair any such bridge or culvert and has appropriated its share of the cost of constructing or repairing the same, it shall be the duty of such other county to make an appropriation for its proportionate share of the expense of such construction or repair. And if the other county fails or refuses to make such appropriation, any court of competent jurisdiction, upon a petition for that purpose, shall issue an order to compel such other county to make such appropriation; or the county which has made its appropriation, may, after giving due notice to the other county, proceed with the construction or repair of the bridge or culvert, and, if the construction or repair is reasonable in kind and costs, recover from the other county, by suit, such proportionate share of the expense as the other county is liable for, with costs of the suit and interest from the time of the completion of the construction or repair; but, if the expense of the construction or repair of the bridge or culvert is unreasonable then the county may recover only the other county's proportionate share of an amount equal to a reasonable expense for the construction or repair."

It is not claimed that the road in question is entirely within eighty rods of the county line between the counties of Whiteside and Lee. The road is of the width of sixty feet. The bridge is located west of the center of the road. This fact is not disputed. The record discloses that a point eighty rods due west from the county line dividing the two counties, will not include any part of the bridge, but will

the investigation of this case.

to be placed on paragraph 4, Chapter 101, which reads:

[illegible][illegible]

It is not claimed that the road is located within eighty feet of the center of the bridge. The road is located west of the center of the bridge. The bridge is located west of the center of the road. This fact is not disputed. The record discloses that a point eighty rods east from the county line dividing the

include about twelve and a half feet of the road. In other words, there is but a part of the public highway or road on which said bridge is maintained that comes within the eighty rods limitation.

It is the contention of the appellant that when the Legislature used the words "on a road within 80 rods of a county line", it meant that if any portion of the road was within eighty rods, that a bridge built on that road should be built at the expense of both counties proportionately; that the purpose of the legislation was to fix a liability on adjoining counties where, in all probability, such county derived a proportionate benefit from the use of the bridge, and to say that the entire road must be within the eighty rods point before it could come within the meaning of the statute, would, in effect, do away with the intent of the Legislature in the passage of the act.

It is contended by appellee, that it was the intent of the Legislature, when enacting said Statute, that it should be restrictive in its application to bridges on roads on county lines and bridges on roads leading from one county to another, and within said prescribed limit of eighty rods from the county line dividing such counties; and that the duty to repair such bridges would be, in such cases, but a correlative of the beneficial use of said bridges by the public, the inhabitants of said counties, which in this proceeding, would be the inhabitants of Whiteside and Lee Counties, and the repairs and upkeep of same properly chargeable, under the statute, to both counties. However, the Howland Creek Bridge and the road on which it is located, in the instant case, it is insisted by appellee, does not fall within this class of bridges and roads, and, therefore, the court did not err in so finding. The only question is whether or not, under a proper interpretation of

the Statute, Lee County can be compelled to pay a portion of the cost of repairing the bridge, when the entire roadway is not within eighty rods of its boundary. We have examined the statute in question and we feel that it would require a strained construction to hold in favor of the contention of Lee County. As a general rule, the law does not recognize fractions or parts of a thing; it does not recognize a part of a day; if but an hour of a day has elapsed the law will consider it a whole day. We are of the opinion that if any part of the road only is within eighty rods of the boundary line, the statute in question must apply and it matters not whether the eighty rods point takes in much or little of the road.

We conclude, therefore, that the judgment of the Circuit Court of Lee County should be reversed and the cause remanded, which is accordingly done.

Reversed and Remanded.

the State, the County can be compelled to pay a portion of the
cost of repaying the debt, when the entire liability is not
within eighty rods of its boundary. We have examined the statute
in question and we feel that it would require a general amend-
ment to hold in favor of the constitution of the County. As a
general rule, the law does not recognize fractions or parts of
a thing; it does not recognize a part of a day; it does not
of a day has elapsed the law will consider it a whole day. We
are of the opinion that in any part of the road only is within
eighty rods of the boundary line, the statute in question must
apply and it matters not whether the eighty rods begin in
much or little of the road.

We conclude, therefore, that the judgment of the
County Court of Lee County should be reversed and the same
reversed, which is respectfully done.

Reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

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MUSEUM OF NATURAL HISTORY
AND
ZOOLOGY
OF THE
CITY OF LONDON
1871

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

FRANKLIN H. BOGGS

Hon. ~~AUGUSTUS A. PARTLOW~~, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

2451.A. 637#4

BE IT REMEMBERED, that afterwards, to-wit: On

APR 29 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN A TERM OF THE APPELLATE COURT.

held as above, on Tuesday, the fifth day of April in
at our Lord one thousand nine hundred and twenty-seven,
and for the Second District of the State of Illinois:

Hon. THOMAS M. LATT, Presiding Justice.

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NORMAN L. JAMES,
FRANKLIN H. ROGGS

REMEMBERED, that aforesaid, to-wit:
the opinion of the Court was filed in
the office of said Court, the words and figures

October Term 1926.

Lizzie Landretto,)	
)	
Appellee,)	
	)	Appeal from the Circuit
-vs-	)	Court of Rock Island County.
First Trust & Savings Bank)	
of Chicago,)	
)	
Appellant.)	

Jett, P. J.

In this proceeding Lizzie Landretto, appellee, filed a bill for divorce in the Circuit Court of Rock Island County, against Sam Landretto, her husband, in which she charged him with extreme and repeated cruelty. Sam Landretto answered the bill and denied the charge of cruelty, and filed a cross bill in which he charged Lizzie Landretto with adultery. She answered the cross bill and said whatever she did was with the consent and connivance of her husband. The First Trust & Savings of Chicago, The American Trust & Savings Bank of Rock Island, were both made parties defendant because of an allegation that they were in possession of certain moneys in which the husband of the appellee, claimed to have an interest.

The divorce issue was submitted to a jury, and the jury found in favor of the appellee, on the original and cross bill, and decree of divorce was entered in favor of the complainant in the original bill. The court then referred the cause to the Master in Chancery to take evidence and report his conclusions in regard to the Liberty bonds, charged to be in the possession of the American Trust and Savings Bank of Rock Island, and also to determine the controversy over the sum of \$2500.00 deposited

October Term 1926.

Appeal from the Circuit
Court of Rock Island County.

Lizzie Landretto,
Appellee,
-vs-
First Trust & Savings Bank
of Chicago,
Appellant.

Left, P. 1.

In this proceeding Lizzie Landretto, appellee, filed a bill for divorce in the Circuit Court of Rock Island County, against Sam Landretto, her husband, in which she charged him with extreme and repeated cruelty. Sam Landretto answered the bill and denied the charge of cruelty, and filed a cross bill in which he charged Lizzie Landretto with adultery. She answered the cross bill and said whatever she did was with the consent and connivance of her husband. The First Trust & Savings Bank of Chicago, the American Trust & Savings Bank of Rock Island, were both made parties defendant because of an allegation that they were in possession of certain moneys in which the husband of the appellee, claimed to have an interest.

The divorce issue was submitted to a jury, and the jury found in favor of the appellee, on the original and cross bill, and decree of divorce was entered in favor of the complainant in the original bill. The court then referred the cause to the Master in Chancery to take evidence and report his conclusions in regard to the Liberty bonds, charged to be in the possession of the American Trust and Savings Bank of Rock Island, and also to determine the controversy over the sum of \$2500.00 deposited

in the First Trust & Savings Bank of Chicago.

The Master in Chancery made a report on the bonds, and the matter was later adjusted by the interested parties, and a decree entered, and the Master also made a report on the controversy as to the \$2500.00 in the First Trust & Savings Bank.

Exceptions were filed by Lizzie Landretto to the Master's report, which were sustained by the chancellor and a decree was entered in favor of appellee against the appellant, the chancellor holding that the appellant should pay to the complainant the sum of \$2500.00, from which decree the appellant has prosecuted this appeal.

Many reasons are assigned for a reversal of the decree. No question is involved in this appeal except the one involving the ownership of the \$2500.00 that had been deposited in the First Trust & Savings Bank of Chicago. The fund in question in this cause represents a part of a savings account deposited in the appellant bank, which was carried in the names of Lizzie and Sam Landretto, as a joint account. Sam Landretto is an Italian and went to Rock Island to live. He took with him the complainant Lizzie Landretto, who was then between fifteen and sixteen years of age. He placed her in a house of ill-fame, and received and lived on her earnings for sometime thereafter. Lizzie Landretto was an inmate of different houses at different times, until she finally established one of her own, in which she kept other girls. A soft drink parlor was run in connection with the house of prostitution. It appears that the only business Sam Landretto had was the driving of a taxi cab; that by threats to kill her, beat her, and by other inhuman and cruel practices, Sam Landretto compelled Lizzie to turn over to him, whatever proceeds were realized in the

in the First Trust & Savings Bank of Chicago.

The Master in Chancery made a report on the bonds, and the Master was later advised by the interested parties, and a decree entered, and the Master also made a report on the controversy as to the \$2500.00 in the First Trust & Savings Bank.

Appellants were filed by Lisette Landretto to the Master's report, which were sustained by the Chancellor and a decree was entered in favor of appellee against the appellant, the Chancellor holding that the appellant should pay to the complainant the sum of \$2500.00, from which decree the appellant has presented this appeal.

Many reasons are assigned for a reversal of the decree. No question is involved in this appeal except the one involving the ownership of the \$2500.00 that had been deposited in the First Trust & Savings Bank of Chicago. The fund in question in this case represents a part of a savings account which was deposited in the appellant bank, which was carried in the names of Lisette and Sam Landretto, as a joint account. Sam Landretto is an Italian and went to Rock Island to live. He took with him the complainant, Lisette Landretto, who was then between fifteen and sixteen years of age. He placed her in a house of ill-fame, and received and lived on her earnings for sometime thereafter. Lisette Landretto was an inmate of different houses at different times, until she finally established one of her own, in which she kept other girls. A soft drink parlor was run in connection with the house of prostitution. It appears that the only business Sam Landretto had was the driving of a taxi cab; that by threats to kill her, beat her, and by other inhuman and cruel practices, Sam Landretto compelled Lisette to turn over to him, whatever proceeds were realized in the

business. She was known as the owner and keeper of the house, and as such, on one occasion, was arrested and fined.

The evidence further shows that the money which was saved by the Landrettos¹ was a part of the proceeds made by Lizzie Landretto in her business. Sam Landretto usually deposited the money, and in order to protect it against attacks from the civil authorities, he placed it in different banks in Rock Island and under different names. It appears that when a considerable account had been accumulated, Sam and Lizzie started the deposit account in the bank of appellant in Chicago. On August 18th, 1920, Lizzie left her husband on account of cruel treatment and withdrew a portion of the joint account. She went to Detroit and has not lived with her husband since. On or about August 20th, 1920, Sam Landretto appeared at the bank and withdrew the balance amounting to \$3535.00; he thereupon deposited all but \$500.00 of it in the same bank in his own name, under savings account numbered 359,505. He later withdrew \$535.00 leaving a balance of \$2500.00 which is the subject of this controversy. It appears that sometime in December of 1920 Lizzie Landretto and an attorney by the name of Willis Clark appeared at the bank in Chicago, and endeavored to withdraw the balance of the account, which was then in the name of Sam Landretto. A Mr. Roehm, an assistant cashier, talked with them concerning the withdrawal of the money; he says it was about the middle of December; Lizzie and her attorney Clark, say it was the 29th of December, and it appears from the current events which immediately followed, they are correct about it. However, under the circumstances in this case, it makes little difference, if any, whether it was the middle of December or the latter part. The testimony discloses that

bank. It was known as the owner and keeper of the house, and as such, on one occasion, was arrested and fined. The evidence further shows that the money which was seized by the Landrethos was a part of the proceeds made by Lillie Landreth in her business. Sam Landreth usually deposited the money, and in order to protect it against seizure by the civil authorities, he placed it in different banks in Rock Island and under different names. It appears that when a considerable amount had been accumulated, Sam and Lillie started the deposit account in the bank of appeal- and in Chicago. On August 18th, 1920, Lillie left her husband on account of cruel treatment and withdrew a portion of the joint account. She went to Detroit and has not lived with her husband since. On or about August 20th, 1920, Sam Landreth appeared at the bank and withdrew the balance amounting to \$3525.00; he thereupon deposited all but \$500.00 of it in the same bank in his own name, under savings account numbered 111,505. He later withdrew \$255.00 leaving a bal- ance of \$2970.00 which is the subject of this controversy. It appears that sometime in December of 1920 Lillie Landreth and an attorney by the name of Willis Clark appeared at the bank in Chicago, and endeavored to withdraw the balance of the account, which was then in the name of Sam Landreth. A Mr. Roehm, an assistant cashier, talked with them concerning the withdrawal of the money; he says it was about the middle of December; Lillie and her attorney Clark, say it was the 29th of December, and it appears from the current events, which immediately followed, they are correct about it. However, under the circumstances in this case, it makes little difference, if not, whether it was the middle of December or the latter part. The evidence indicates that

Roehm was advised that Lizzie Landretto was on her way to Rock Island, where she intended to start suit for divorce, and would attempt to get possession of the money in this savings account as well as certain other property, claimed by her husband Sam Landretto; she testified and so did Clark that she told Roehm the money belonged to her.

Roehm does not deny that she made this statement but says that he does not recollect it. In view of the fact that she and her attorney had gone to the bank for the purpose of making claim to the deposit, it is probable that she made the statement. She and Clark also testify that Roehm told them he would not let the money be paid out within ten days, and not within thirty days if that much time was necessary, for the purpose of the contemplated proceedings. Roehm denied that he made any such statement, but says that he told them he would hold it for a few days and did so, under the promise that they would have a written order served upon him. The evidence further shows that on the day following the conversation with Roehm, appellee and her attorney Clark, went to Rock Island, where they engaged local counsel and started the preparation of a bill, for a divorce. The bill was prepared and sworn to on December 31st, 1920. It was not filed however, until January 4th. It prays for an injunction against Sam Landretto, and also against the two banks, seeking to restrain them from disposing of any of the money or property, claimed by Sam Landretto. The chancery summons and also the injunction were served on Sam Landretto immediately; the summons was served on the bank on January 8th but the injunction was not served at that time. Just why it was not served does not appear, but it is likely that the failure to serve it was due to the fact that prior to the service of summons on the bank, and on the same day, Sam Landretto had

Roehm was advised that Lizzie Landsteto was on her way to
Rock Island, where she intended to start suit for divorce,
and would attempt to get possession of the money in this
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For the purpose of the testimony presented,
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impression that they would have a written order served upon him.
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versation with Roehm, Agnes and her attorney Clark, went
to Rock Island, where they engaged local counsel and started
the preparation of a bill for a divorce. The bill was pre-
pared and sworn to on December 31st, 1930. It was not filed
however, until January 4th. It prays for an injunction
against Sam Landsteto, and also against the two banks, seek-
ing to restrain them from disposing of any of the money or
property, claimed by Sam Landsteto. The emergency summons and
also the injunction were served on Sam Landsteto immediately;
the summons was served on the bank on January 5th but the in-
junction was not served at that time. Just why it was not
served does not appear, but it is likely that the failure to
serve it was due to the fact that prior to the service of
summons on the bank, and on the same day, the injunction was

withdrawn all but \$1.00 of the account.

The evidence taken and reported by the Master consists almost entirely of depositions of the witnesses; Sam Landretto was not in attendance; neither did he testify before the Master in Chancery. The testimony discloses the state of facts herein above recited.

We are convinced, from what is disclosed in this record that the money is the property of Lizzie Landretto; that the bank had ample notice of her claim; that in turning it over to Sam Landretto, under the circumstances as shown, does not excuse the bank from liability. The fund was in the savings account and not the subject of check. This fact has a material bearing upon the question of delay in instituting the proceedings, and serving the injunction on the bank. A distinction is easily discerned between an account which is subject to check, and a savings account which is not subject to check.

The by-laws of the savings institution of appellant expressly reserve the right, as a condition of any saving deposit, to demand and receive sixty days notice of the intention to withdraw an account. It may be that this by-law is not generally enforced, but whatever the practice of the bank may be with reference to its enforcement, is one adopted by it for its own convenience and does not effect the legal situation.

In view of the knowledge the bank had of the controversy between Lizzie Landretto and Sam, and of her claim to this fund, it must be held it permitted the withdrawal by Sam Landretto, of the \$2500.00 at its peril.

In reaching the above conclusion, we have not over-looked the fact that it is the contention of appellant that the money deposited was the profits of prostitution and

withdrawing all but \$1.00 of the account. The evidence taken and reported by the Master indicates almost entirely of depositions of the witnesses; Sam Landratto was not in attendance; neither did he testify before the court in person. The testimony discloses the state of facts herein above recited.

We are convinced, from what is disclosed in this record that the money is the property of Lizzie Landratto; that she had notice of her claim; that in turning it over to the bank, under the circumstances as shown, does not excuse the bank's liability. The fund was in the savings account and not the subject of check. This fact has a material bearing upon the question of delay in instituting the proceedings, and serving the injunction on the bank. A distinction is easily discerned between an account which is subject to check, and a savings account which is not subject to check.

The by-laws of the savings institution of appellant expressly reserve the right, as a condition of any saving account, to demand and receive sixty days notice of the intention to withdraw an account. It may be that this by-law is not generally enforced, but whatever the practice of the bank may be with reference to its enforcement, is one adopted by it for its own convenience and does not effect the legal situation.

In view of the knowledge the bank had of the controversy between Lizzie Landratto and Sam, and of her claim to this fund, it must be held it permitted the withdrawal by Sam Landratto, of the \$1.00 at its peril.

In reaching the above conclusion, we have not overlooked the fact that it is the contention of appellant that the money deposited was the profits of prostitution and

other illegal business of Lizzie Landretto and Sam Landretto, and that a decree for appellee involves an accounting of funds obtained in an unlawful business, which it is said "courts will not enter upon." The parties were not in pari delicto. The verdict of the jury establishes that fact. Appellant insists appellee is not entitled to the money, yet it is assuming the position that it belonged to Sam Landretto, and that he had a right to it. If it was tainted money as to Lizzie, it certainly was as to Sam Landretto.

If this contention of appellant is sound then neither of these parties, notwithstanding what right might be shown to the fund, would be entitled to it. This position of appellant is evidently an after-thought, judging from its conduct in turning the money over to Sam Landretto, under the facts as disclosed in this record.

Other questions are argued by appellant. We have investigated them and are of the opinion that there is no merit in them.

A cross error was assigned by complainant because the interest was not allowed on the \$2500.00, from the time of the notice to the appellant to the date of the decree.

It will be remembered that the fund was deposited in the names of Sam Landretto and Lizzie Landretto; and that on or about August 19, 1920, Lizzie Landretto was paid \$2000 out of the joint account on her check, and the balance was paid to Sam Landretto on his check at a subsequent date. Since Lizzie Landretto claims that the last payment of \$2500.00 to Sam was wrongfully made as the money belonged to her, it was incumbent upon her to prove that fact. This in our opinion, she has done. It is not contended that she ever presented

other illegal business of Lissie Landstetter and Sam Landstetter, and that a license for appellee involves an accounting of funds obtained in an unlawful business, which it is said "counts will not count." The parties were not in any doubt. The verdict of the jury establishes that fact. Appellant insists appellee is not entitled to the money, yet it is according the position that it belonged to Sam Landstetter, and that he had a right to it. If it was tainted money as to Lissie, it certainly was so to Sam Landstetter. If this contention is true, then appellant is wrong. Neither of these parties, notwithstanding what right might be shown to the fund, would be entitled to it. This position of appellant is evidently an after-thought, judging from the account in turning the money over to Sam Landstetter, under the facts as disclosed in this record. Other questions are argued by appellant. We have investigated them and are of the opinion that there is no merit in them. A gross error was suggested by complainant because the fund was not allowed on the \$2500.00, from the time of the notice to the appellant to the date of the decree. It will be remembered that the fund was deposited in the names of Sam Landstetter and Lissie Landstetter; and that on about August 11, 1911, Sam Landstetter was paid of the joint account on her check, and the balance was paid to Sam Landstetter on his check at a subsequent date. Since Lissie Landstetter claims that the last payment of \$2500.00 to her was wrongfully made as the money belonged to her, it was incumbent upon her to prove that fact. This in our opinion she has done. It is not contended that she ever questioned the fact that the fund was deposited in the names of Sam Landstetter and Lissie Landstetter.

any check or applied to the bank for payment while the account was in their names jointly, or presented the book in which the savings account was noted. Taking into consideration the entire record in this proceeding, we are not prepared to say that the court committed reversible error in refusing to allow interest contended for by appellee under her cross error. We therefore conclude that the decree of the Circuit Court of Rock Island County should be affirmed, which is accordingly done.

Judgment affirmed.

S. J. G. & S. J. G.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS I. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

It is the duty of the
people to support the
government in its efforts
to maintain the peace and
order of the world.

The government has the honor
to receive the distinguished
guests of the world.

Guest list continued on p. 2

Continued on p. 2

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60672 245 I.A. 638 #1

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

29 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

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April Term 1927.

Isaac Thomason,

Appellee,

-vs-

Central Illinois Public
Service Company,

Appellant.

Appeal from the Circuit
Court of Iroquois County.

Jett, P. J.

This is an appeal by the Central Illinois Public Service Company, appellant, from a judgment rendered against it in the Circuit Court of Iroquois County, in favor of Isaac Thomason, in the sum of \$2600.

Since the appeal of this cause to this court, the death of Isaac Thomason has been suggested and Nettie Thomason, administratrix of the estate of Isaac Thomason, deceased, has been substituted as party plaintiff.

This case was before this court at the April term, 1924, on an appeal by the defendant, appellant here, from a judgment rendered in the Circuit Court of Iroquois County in favor of Isaac Thomason for \$2500 and was reversed and remanded on account of an erroneous instruction. On the second trial in the Circuit Court of said county, the jury returned a verdict in favor of Isaac Thomason for \$3750 upon which the court entered judgment and again an appeal was prosecuted to this court by the appellant and the judgment was reversed and the cause remanded by reason of the admission of certain incompetent testimony on the part of the plaintiff. On the third trial, the jury returned a verdict in favor of Isaac Thomason for \$2600 on which judgment

April Term 1937.

1937.

Appeal from the Circuit
Court of Irons County.

Appellant.

-vs-

Central Illinois Electric
Company, Inc.

Appellee.

1937, 1. 1.

This is an appeal by the Central Illinois Electric
Company, appellant, from a judgment rendered against it
in the Circuit Court of Irons County, in favor of Isaac
Thompson, in the sum of \$2500.
Since the appeal of this cause to this court, the
basis of Isaac Thompson has been suggested and Nettie Thompson,
administratrix of the estate of Isaac Thompson, deceased, has
been substituted as party appellee.
This case was before this court at the April term,
1937, on an appeal by the defendant, appellant here, from a
judgment rendered in the Circuit Court of Irons County in
favor of Isaac Thompson for \$2500 and was reversed and remanded
on account of an erroneous instruction. On the second trial
in the Circuit Court it was found, and judgment was entered
in favor of Isaac Thompson for \$2500 and was reversed and remanded
on account of an erroneous instruction. On the third trial, the jury returned
a verdict in favor of Isaac Thompson for \$2500 on which judgment
was entered and the judgment was reversed and the cause remanded
by reason of the admission of certain incompetent testimony on
the part of the plaintiff. On the third trial, the jury returned
a verdict in favor of Isaac Thompson for \$2500 on which judgment

was rendered and this appeal followed.

The declaration consists of two counts. The first averred that the defendant company, through its servants, was engaged in taking down certain electric wires and other appliances attached to poles, along a highway opposite a certain field in which the plaintiff was working and driving a team of horses with a farm disc attached thereto; that the plaintiff, in the exercise of due care for his own safety, was driving said team of horses from a field upon the public highway, and while so doing, one of the defendant's servants negligently and carelessly permitted a cross-arm to drop from a certain pole from a height of twenty feet upon the ground near said team so that the team became greatly frightened and ran away, causing the plaintiff to be thrown to the ground and dragged so that he was injured by said disc and lost one thumb and the use of his hand was greatly impaired; and that he received other great bodily injuries. The second count is substantially the same as the first, but has the additional averment that the fall of the cross-arm made a great noise and frightened the said team of horses.

Counsel for defendant urges that the motion in arrest of judgment should have been sustained because of alleged insufficiency of both counts of the declaration. It is claimed that the defendant's servants, in dismantling the transmission line, were doing what they might lawfully do and that there is no averment in either count of any duty of the defendant to refrain from dropping the cross-arm at the time it is charged by the plaintiff that the same was dropped.

The first count contains no averment as to noise, it charges that the defendant's servants negligently and carelessly permitted the cross-arm to drop upon the ground near the team

was referred and this appeal followed.

The declaration consists of two counts. The first count alleges that the defendant company, through its servants, was negligent in taking down certain electric wires and other appliances attached to poles, along a highway opposite a certain field in which the plaintiff was working and driving a team of horses with a farm disc attached thereto; that the plaintiff, in the exercise of due care for his own safety, was driving said team of horses from a field upon the public highway, and while so doing, one of the defendant's servants negligently and carelessly permitted a cross-arm to drop from a certain pole from a height of twenty feet upon the ground near said team so that the team became greatly frightened and ran away, causing the plaintiff to be thrown to the ground and injured so that he was injured by said disc and lost one thumb and the use of his hand was greatly impaired; and that he received other great bodily injuries. The second count is substantially the same as the first, but has the additional averment that the fall of the cross-arm made a great noise and frightened the said team of horses.

Counsel for defendant urges that the motion in arrest of judgment should have been sustained because of alleged inconsistency of both counts of the declaration. It is claimed that the defendant's servants, in dismantling the transmission line, were doing what they might lawfully do and that there is no averment in either count of any duty of the defendant to refrain from dropping the cross-arm at the time it is changed by the plaintiff that the same was dropped.

The first count contains no averment as to noise, it charges that the defendant's servants negligently and carelessly permitted the cross-arm to drop upon the ground near the team

so that the team became frightened and ran away. The second count charges that the falling of the cross-arm made a great noise and frightened the horses so that they ran away. It does not expressly aver that it was the duty of the defendant not to so drop the cross-arm, and occasion a noise that would likely cause the horses to run away, nor do we think any such particularity of averment is necessary upon a motion in arrest of judgment or even upon demurrer. Upon demurrer a declaration is construed against the pleader, but after verdict all intentions and presumptions are in its favor. (Sargent Co. v. Baublis, 215 Ill. 428; Chicago City Ry. Co. v. Shreve, 226 Ill. 530). When a declaration sets up a state of facts, the existence of which gives rise to a duty and discloses a failure to perform that duty together with a resultant injury, there is a sufficient charge of actionable negligence. Both counts set forth a situation that necessarily implies a duty not to drop a cross-arm close to approaching horses or so as to produce a great noise close to them. It is well understood by everybody that a great noise so produced is likely to scare horses and cause them to run away. In Miller v. Kresge Co. 306 Ill. 104, the Supreme Court said

"It is sufficient if the facts stated are such as to raise a duty and show a failure to perform that duty and a resulting injury from which the law will attach to such failure of duty the charge of negligence."

On May 11, 1923, the defendant was engaged in dismantling an abandoned transmission line along a public highway about three miles northwest of the Village of Milford. The work was being conducted by a force of six men under the direction of H. O. Cherry, Division Line Foreman. The transmission line was located along the south side of a public highway running east and west. The poles were approximately

The second team became frightened and ran away. The first team made a great noise and frightened the horses so that they ran away. It was the duty of the defendant to keep the horses from running away, and occasion a noise that would cause the horses to run away, nor do we think any such necessity of movement is necessary upon a motion in arrest of judgment or even upon demurrer. On demurrer a declaration is sustained against the pleader, but after verdict all intentions are in its favor. (Sargent Co. v. Chicago City Ry. Co., 111 Ill. 235, 236.) A declaration sets up a state of facts, the existence of which gives rise to a duty and discloses a failure to perform that duty to their with a result and injury, there is a sufficient charge of actionable negligence. Both counts set forth a situation that necessarily implies a duty not to give a great noise close to approaching horses or so as to produce a great noise close to them. It is well understood by everybody that a great noise so produced is likely to scare horses and cause them to run away. In Miller v. Kroger Co., 104 Ill. 104, the Supreme Court said:

"It is sufficient if the facts stated are such as to raise a duty and show a failure to perform that duty and a resulting injury from which the law will attach to such failure of duty the charge of negligence."

On May 11, 1923, the defendant was engaged in discharging an abandoned transmission line along a public highway at three miles northwest of the Village of Milford. The work was being conducted by a force of six men under the direction of H. O. Cherry, Division Line Foreman. The transmission line was located along the south side of a public highway running east and west. The poles were approximately

110 feet apart. The wires had been detached and thrown upon the ground. The work of taking the cross-arms from the poles was in progress at the time of the accident somewhere about ten-thirty o'clock in the morning. The plaintiff was a farm hand employed by Percy Martin and was engaged in discing a field immediately south of the highway where defendant's employees were at work. He started to drive to his home, and this required him to go out upon said public highway and then west. A fence separated the public highway from the field but there was a gap in the fence through which the plaintiff drove to and from the field. He testified that as he approached the gap he saw the men at work upon the poles loosening the cross-arm and he asked them to let him out; that one man held up the wires so that plaintiff could drive under them; and that just as he got past he heard the cross-arm or something fall behind him. The horses jumped, ran across the road and then east down to a ditch, where he was thrown off and received the injuries complained of.

Percy Martin, the man for whom the plaintiff worked, testified that he saw a man drop a cross-arm from the second pole west of the gap; that at the time the cross-arm was dropped the team was just through the gap and started to run; and that he was thirty rods west of the gap and about ten rods down in the field. He states, however, that he was only about one hundred twenty feet from where the cross-arm was dropped.

The testimony offered on the third trial of this cause is substantially the same as it was on the former trials. The same argument is made on this appeal, as to the sufficiency of the declaration, the motion in arrest of judgment, the question of the proximate cause, and the motion for a directed verdict, as was made on the former appeals. We have examined the record as presented on this occasion, and we are of the opinion that no

110 feet apart. The wires had been detached and thrown upon the ground. The work of taking the cross-arm from the poles was in progress at the time of the accident somewhere about ten-thirty o'clock in the morning. The plaintiff was a team hand employed by Percy Martin and was engaged in clearing a field immediately south of the highway where defendant's car was at work. He started to drive to his home, and this required him to go west on said public highway and then west. A fence separated the public highway from the field but there was a gap in the fence through which the plaintiff drove to and from the field. He testified that as he approached the gap he saw the cross-arm upon the poles loosening the cross-arm and he asked them to let him out; that one man held up the wires so that plaintiff could drive under them; and that just as he got past the cross-arm or something fell behind him. The horses jumped, ran across the road and then east down to a ditch, where he was thrown off and received the injuries complained of. He was thrown off and received the injuries complained of. Percy Martin, the man for whom the plaintiff worked, testified that he saw a man drop a cross-arm from the second pole west of the gap; that at the time the cross-arm was dropped the team was just through the gap and started to turn and that he was thirty rods west of the gap and about ten rods down in the field. He states, however, that he was only about one hundred twenty feet from where the cross-arm was dropped.

The testimony offered on the third trial of this cause is substantially the same as it was on the former trials. The same argument is made on this appeal, as to the sufficiency of the declaration, the motion in arrest of judgment, the question of the proximate cause, and the motion for a directed verdict, as was made on the former appeals. We have examined the record as presented on this occasion, and we are of the opinion that no

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reversible error appears and the judgment of the Circuit Court of Iroquois is affirmed.

Judgment Affirmed.

60682

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 29 1927 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

AT A TERM OF THE SUPREME COURT,

in the case of *State of Texas, Plaintiff, vs. The Citizens of the State of Texas, Defendants*, the fifth day of April, A.D. 1890.

Justice

WILLIAM L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
FLOYD S. CLARK, Sheriff.

THE COURT, in the opinion of the majority, is of the opinion that the

Thomas Bratt,

Appellee,

vs.

John Losher, Commissioner
of Highways, Cazenovia
Township, Woodford County,
Illinois.

Appellant.

Appeal from the Circuit Court
of Woodford County.

Jett, P. J.

Thomas Bratt, appellee, filed a bill in the Circuit court of Woodford County, Illinois, against John Losher, Commissioner of Highways, and Theodore Braun, praying for an injunction against the vacating of an old road mentioned and described in the bill and for a mandatory injunction to remove certain obstructions in said road.

For convenience the appellee will be called complainant and appellant defendant.

The basis for the injunction as alleged in said bill was the lack of jurisdiction in said Commissioner of Highways, John Losher, for the reason that the petition presented to the Commissioner of Highways lacked a sufficient number of land owners as signers residing within two miles of the road to be vacated; for the want of proper notices and for the failure of a certificate of the posting of notices.

Losher, Commissioner of Highways, demurred to the bill and Braun filed an answer. The demurrer was taken under advisement by the court and from what we gather from the record leave was granted the complainant to amend the bill prior to a decision on the demurrer. The bill was amended and thereupon the defendant, Braun, was dismissed from the suit, Certain

Appeal from the Circuit Court
of Woodford County.

Thomas Brown, Plaintiff,
vs.
John Loshier, Commissioner
of Highways, Defendant.
Woodford County,
Illinois.

July 1, 1914.

Thomas Brown, Plaintiff, filed a bill in the Circuit
Court of Woodford County, Illinois, against John Loshier, Commissioner
of Highways, and Theodore Brown, praying for an injunction against
the vacating of an old road mentioned and described in the bill
and for a mandatory injunction to remove certain obstructions
in said road.

For convenience the appellee will be called complainant
and appellant defendant.

The basis for the injunction as alleged in said bill
was the lack of jurisdiction in said Commissioner of Highways,
John Loshier, for the reason that the petition presented to the
Commissioner of Highways lacked a sufficient number of land
owners as signers residing within two miles of the road to be
vacated; for the want of proper notices and for the failure of
a certificate of the posting of notices.

Loshier, Commissioner of Highways, demurred to the bill
and Brown filed an answer. The demurrer was taken under advice-
ment by the court and later on the same day the court
was granted the complainant to amend the bill prior to a
decision on the demurrer. The bill was amended and thereupon
the defendant, Brown, was dismissed from the suit. Certain

minor amendments were again made and the demurrer of Losher, Commissioner of Highways, was re-filed to the bill as amended. The court over-ruled the demurrer and Losher, Commissioner of Highways, elected to stand by his demurrer. A decree in favor of the complainant was then entered.

Two points are particularly urged by the defendant for a reversal of the decree. The (1) is that there is a complete and adequate remedy at law by certiorari, and that that remedy is the only remedy available on the part of the complainant because the jurisdiction of the commissioner of highways is attacked. And (2) that the allegations in the bill are insufficient to sustain the decree. A number of authorities have been cited by the defendant in support of his contention.

In view of the conclusion we have reached we do not deem it necessary to review the authorities relied upon by the defendant. In *Caldwell vs. Moffatt, et al.*, 215 Ill. App. 583, the court, in discussing the question raised, by the defendant here, relative to the remedy of the complainant being one at law by way of a petition for certiorari, at pages 588 and 589 said:

"It is urged by appellee that appellant has a complete remedy of law by a writ of certiorari and that a bill for injunction will not lie. For a great many years it has been held consistently that the common-law writ of certiorari is a proper way to review the record of the highway commissioners in proceedings to open and lay out new roads in order to determine the validity of their acts. *Highway Com'rs of Town of Geneseo v. Harper*, 38 Ill. 104; *Hyslop v. Finch*, 99 Ill. 171; *Bailey v. McCain*, 92 Ill. 277; *Smith v. Highway Com'rs of Hudson Tp.*, 150 Ill. 385; *Highway Com'rs of Town of McKee v. Smith*, supra; *Matthiessen v. Ott*, supra. The Supreme Court, however, in the case of *Frizell v. Rogers*, 82 Ill. 109, specifically held: 'The equitable jurisdiction in such cases is well settled.' This case was followed and cited in *Newby v. Highway Com'rs*, 21 Ill. App. 246; *Whittaker v. Gutheridge*, 52 Ill. App. 462. The case of *Frizell v. Rogers*, supra, has never been over-ruled and apparently this is one of the few instances where equitable and legal remedies have concurrent jurisdiction."

minor amendments were again made and the Governor of Iowa, Commissioner of Highways, was re-filed to the bill as amended. The court over-ruled the Governor and Iosher, Commissioner of Highways, elected to stand by his Governor. A decree in favor of the complainant was then entered.

Two points are particularly urged by the defendant. The first is that there is a complete and adequate remedy at law by certiorari, and that that remedy is the only remedy available on the part of the complainant because the jurisdiction of the Commissioner of Highways is attacked. And (2) that the allegations in the bill are insufficient to sustain the decree. A number of authorities have been cited by the defendant in support of his contention.

In view of the conclusion we have reached we do not deem it necessary to review the authorities relied upon by the defendant. In *Udwell vs. Moffatt*, 215 Ill. App. 588, the court, in discussing the question raised, by the defendant here, relative to the remedy of the complainant being one at law by way of a petition for certiorari, at pages 588 and 589 said:

"It is urged by appellee that applicant has a complete remedy of law by a writ of certiorari and that a bill for injunction will not lie. For a great many years it has been held consistently that the common-law writ of certiorari is a proper way to review the record of the highway commissioner in proceedings to open and lay out new roads in order to determine the validity of their acts. *Highway Com'rs of Town of Geneseo v. Harper*, 33 Ill. 104; *Highway v. Tine*, 92 Ill. 171; *Bailey v. McGowan*, 42 Ill. 277; *Smith v. Highway Com'rs of Jackson Tp.*, 150 Ill. 385; *Highway Com'rs of Town of McKee v. Smith*, 111. 385; *Matthews v. Ott*, supra. The Supreme Court, however, in the case of *Truitt v. Rogers*, 38 Ill. 109, specifically held: 'The equitable jurisdiction in such cases is well settled.' This case was followed and cited in *Newby v. Ott*, 111. 111. App. 246; *Whittaker v. Ott*, 111. App. 452. The case of *Truitt v. Rogers*, supra, has never been over-ruled and apparently this is one of the few instances where equitable and legal remedies have concurrent jurisdiction."

In view of the rule announced in *Caldwell v. Moffat*, supra, and cases cited therein, we are of the opinion that the court had jurisdiction of this cause.

As to the second reason relied upon by the defendant for a reversal of the decree, it will be observed that the bill of complaint alleges that the obstructions were placed in the highway by the Commissioner of Highways, Losher, or the defendant Braun.

Although the record discloses that Braun was dismissed out of the suit and the prayer of the bill amended so as to ask no relief against him, yet the allegation that the obstructions were placed in the highway by Braun or by Losher, was left unchanged. When the decree was entered by the Chancellor it granted relief against Losher, Commissioner of Highways, alone and ordered him to remove the obstructions. We are of the opinion that this was erroneous because the decree could have no broader scope than the allegations of the bill and there is no positive allegation in the bill that Losher, the Commissioner of Highways, was guilty of obstructing the highway. The decree, therefore, is affirmed in all respects, except as to the finding of the decree that Losher, Commissioner of Highways, placed the obstruction in the highway and as to the decretal portion thereof which commands him to remove the obstructions.

The decree, therefore, is affirmed in part and reversed in part at the cost of appellant.

Decree Affirmed in Part and Reversed in Part.

In view of the rule announced in *Calderwell v. Wolfelt*,
supra, and cases cited therein, we are of the opinion that the
court had jurisdiction of this cause.

As to the second reason relied upon by the defendant
for a reversal of the decree, it will be observed that the
bill of complaint alleges that the obstructions were placed
in the highway by the Commissioner of Highway, Losher, or
the defendant herein.

Although the record discloses that Losher was dismissed
out of the suit and the prayer of the bill amended so as to
set no relief against him, yet the allegation that the obstruc-
tions were placed in the highway by Losher, or
left unremoved, was not removed by the amendment.
It stated relief against Losher, Commissioner of Highway,
alone and ordered him to remove the obstructions. We are of
the opinion that this was erroneous because the decree could have
no broader scope than the allegations of the bill and there is
no positive allegation in the bill that Losher, the Commissioner
of Highway, was guilty of obstructing the highway. The decree,
therefore, is erroneous in its scope, and the defendant is
entitled to a reversal of the decree and a new decree entered
which shall aim to remove the obstructions.

The decree, therefore, is affirmed in part and reversed
in part at the cost of appellant.

It is ordered that the decree affirmed in part and reversed in part
be amended and that the defendant pay the costs of this appeal.
App. 100. The case of *Calderwell v. Wolfelt*,
supra, is cited.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

THE

LIBRARY

OF THE
MUSEUM OF
NATURAL HISTORY
AND
ZOOLOGY
OF THE
CITY OF LONDON

6069 245 T.A. 638¹³

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

~~APR 23~~ 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

1890
COUNTY

of 51 days, on Tuesday, 27
and one thousand nine hundred
the second day of the

THOMAS M. JETT, President
J. THOMAS L. JONES, 1890
M. FRANKLIN M. BOGGS, 1891

1890

The Board of Education of School District
No. 62, Whiteside County, Illinois,
Complainant,

-vs-

Smith Trust & Savings Bank and United
States Fidelity & Guaranty Company,

Defendants,

On appeal of United States Fidelity and
Guaranty Company,

Appellant,

-vs-

Smith Trust & Savings Bank,

Appellee.

Appeal from the
Circuit Court of
Whiteside County.

Left, p. 4.

The Board of Education of School District No. 62,
Whiteside county, Illinois, filed its bill in the circuit court
of Whiteside county against appellant, the United States Fidelity
& Guaranty Company, and appellee, the Smith Trust & Savings Bank,
praying that they may be required to interplead and settle their
respective rights to a fund of \$2135 held by complainant. Upon
leave being joined the cause was referred to a master who
recommended a decree in favor of appellant, and master's report
was sustained by the chancellor and a decree was entered in favor of
appellee, the Smith Trust & Savings Bank, also requiring appellant
to account for \$600, and for the value of certain tools and
equipment on the contract which had been taken possession of by
appellee. To review the decree an appeal has been prosecuted
to this court.

On June 1, 1922, Paul N. Holm entered into a building contract with said school board for an addition to a school house in Morrison, Illinois, for a consideration of \$55,000, and appellant became surety on a bond for the faithful performance of the contract. The application for the bond provided that for the better protection of appellant that Holm should assign and transfer to appellant all right, title and interest to all tools, plant equipment, and material that he might have upon the work, including material purchased for or charged to the contract which might be in course of construction or storage, or in transportation. Appellant was authorized to take possession of such property and to use the same should Holm be unable to complete the work in accordance with the contract, or in the event of any default on the part of Holm under the contract. The appellant was to be subrogated to all rights, privileges and property, as principal, or otherwise in such contract, and Holm assigned to appellant all the deferred payments, and all money and property that might be due to Holm at the time of any default under the contract.

On July 12, 1922, Holm borrowed \$2000 of appellee, The Smith Trust & Savings Bank, and gave an order on the school board for that sum, which order was delivered to the secretary of the school board and retained by him, but no action was taken thereon by the board. Subsequently the school board issued a school order to Holm for \$6000. The secretary of the school board delivered to appellee the order for \$2000 in favor of appellee, together with the school order for \$6000 payable to Holm. On the same day, both orders were returned to the secretary with the statement that appellee was to receive payment on the \$2000 order out of the last money due and payable to Holm. The secretary retained the \$2000 order and no part of it was ever paid.

On June 1, 1932, Paul W. Holm entered into a building contract with the school board for an addition to a school house in Madison, Illinois, for a consideration of \$25,000, and

applicant became surety on a bond for the faithful performance of the contract. The application for the bond provided that for the better protection of applicant that Holm should assign and transfer to applicant all right, title and interest in all tools, equipment, and material that he might have upon the work, including material purchased for or charged to the contract which might be in course of construction or storage, or in transportation. Applicant was authorized to take possession of such property and to use the same should Holm be unable to complete the work in accordance with the contract, or in the event of any default on the part of Holm under the contract. The applicant was to be assigned to all rights, privileges and property, as principal or otherwise in such contract, and Holm assigned to applicant all the referred payments, and all money and property that might be due to Holm at the time of any default under the contract.

On July 12, 1932, Holm borrowed \$2000 of applicant, and the Smith Trust & Savings Bank, and gave an order on the school board for that sum. The school board retained by him, but a check was given thereon by the board. Subsequently the school board issued a school order to Holm for \$6000. The secretary of the school board delivered to applicant the order for \$6000 payable to applicant, together with the school order for \$6000 payable to Holm. On the same day, both orders were returned to the secretary with the statement that applicant was to receive payment of the \$2000 order out of the last money due and payable to Holm. The secretary retained the \$2000 order and no part of it was ever paid.

On March 26, 1923, Holm defaulted on his contract and notified the school board in writing that he was financially unable to complete the building. Appellant was notified of the default and thereupon entered into a written contract with the school board to complete the building. The school board agreed that on the completion of the building at a reasonably early date and an acceptance of the work by the school board, that the school board would pay to appellant the balance due under the contract without deductions for damages for delay, or failure on the part of Holm, to complete the building at the time specified in the original contract.

Appellant entered upon the performance of its contract with the school board and took possession of all equipment, material, tools and supplies on the job belonging to Holm, as provided in the application for the bond. In completing the work, appellant expended \$11,550.50 and received from the school board on said contract \$6500.00, and the \$2135.00 now in the hands of the board and in controversy in this case, is the balance due appellant from the school board under its contract with the board and by reason of the completion of the work by appellant, all of which was earned after the default of Holm.

Prior to the default, Holm had also entered into a contract with a school district at Clinton, Iowa, for the construction of a school building, appellant had executed a bond for the faithful performance of the work, and the application for the bond was almost identical with the application in this case. During the progress of the work on the two buildings it is claimed that Holm used \$600.00 of the money which he received from the Morrison job to tide over the Clinton job, which money was to be paid back; that this expenditure was made with the knowledge and consent of appellant. This is the \$600.00 which

On March 26, 1923, Holm defaulted on his contract and notified the school board in writing that he was financially unable to complete the building. The school board agreed to enter upon a written contract with the school board to complete the building. The school board agreed that on the completion of the building, the balance due under the contract would be paid by the school board, that the school board would pay to appellant the balance due under the contract with deductions for damages for delay, or failure on the part of Holm, to complete the building at the time specified in the original contract.

Appellant entered upon the performance of his contract with the school board and took possession of all equipment, material, tools and supplies on the job belonging to Holm, as provided in the application for the bond. In completing the work, appellant expended \$11,586.50 and received from the school board on said contract \$8500.00, and the \$3186.50 now in the hands of the board and in controversy in this case, is the balance due appellant from the school board under its contract with the board and by reason of the completion of the work by appellant, all of which was earned after the default of Holm.

After to the default, Holm had also entered into a contract with a school district at Clinton, Iowa, for the construction of a school building. Appellant had executed a bond for the faithful performance of the work, and the application for the bond was almost identical with the application in this case. During the progress of the work on the two buildings it was alleged that Holm used \$600.00 of the money which he received from the Morrison job to tide over the Clinton job, which money was to be paid back; that this expenditure was made with the knowledge and consent of appellant. This is the \$600.00 which

the court found should be accounted for in this proceeding, together with the value of the equipment which appellant seized upon the Morrison job.

As grounds for reversal appellant claims that it had a right to the money by virtue of the contract between it and the school board, the performance of that contract, and the acceptance of the work by the school board; that appellant was entitled to the money through its right of subrogation as provided in the application for the bond; that the assignment upon which appellee bases its claim was given ten days after the assignment to appellant; that the assignment to appellee was not an equitable assignment because it only assigned a part of the fund, and it was never accepted by the school board; that the evidence does not show that the money loaned to Holm by appellee was ever used to pay for labor or material on the building, and even if it was so used by Holm that appellee was not entitled to be subrogated to the rights of those whose claims had been so paid; that after exceptions to the master's report had been argued, the chancellor permitted appellee to file an amendment to the pleadings which changed the issues, with no opportunity to appellant to meet the new issues as formed.

Appellee contends that appellant by seizing all of the tools, equipment, and material, deprived appellee of its right to make a levy on this property; that the seizure was void because appellant did not comply with the Bulk Sales Act of Illinois; that appellant cannot claim that the application for the bond is a chattel mortgage for the reason that it did not comply with the chattel mortgage law, either in taking said application or in reporting the sale thereunder; that having seized all of the property under the application,

the court found should be accounted for in this proceeding.
together with the value of the equipment which appellant claimed
upon the mortgage.

As grounds for reversal appellant claims that it had
a right to the value of the equipment between it and

the school board, the performance of that contract, and the
assignment of the work by the school board; that appellant was
entitled to the money through its right of subrogation as

provided in the application for the bond; that the assignment
upon which appellee bases its claim was given ten days after the
assignment to appellant; that the assignment to appellee was

not an assignable assignment because it only assigned a part
of the fund, and it was never accepted by the school board;

that the evidence does not show that the money loaned to Holm
by appellee was ever used to pay for labor or material on the
building, and even if it was so used by Holm that appellee was

not entitled to be subrogated to the rights of those whose
claims had been so paid; that after exceptions to the master's
report had been argued, the chancellor permitted appellee to

file an amendment to the pleadings which changed the issues,
with no opportunity to appellee to meet the new issues as
presented.

Appellee contends that appellant by seizing all of the
tools, equipment, and material, deprived appellee of its right
to make a levy on this property; that the seizure was void

because appellant did not comply with the Bulk Sales Act of
Illinois; that appellant cannot claim that the application
for the bond is a chattel mortgage for the reason that it did

not comply with the chattel mortgage law, either in taking
said application or in reporting the sale thereunder; that
appellee seized all of the property under the application.

appellant elected its remedy, all of which remedies must be derived from the application; that the maxim of "he who seeks equity must do equity" requires that appellant restore appellee to the same position it was in before appellant seized the goods in bulk contrary to the law.

It will not be necessary to consider in detail each of these respective claims. The question for determination was the ownership of the \$2135.00 brought into court. It was not the province of the court to make a general accounting between the parties and decree the payment of the balance found due out of the money brought into court which was, in fact, the property of appellant in the absence of any equitable claim thereon in favor of appellee. *Dyas vs. Dyas*, 231 Ill. 367; *Galpin vs. City of Chicago*, 269 Ill. 27. Notwithstanding this rule of law the court made an accounting between the parties. The reasonable value of the property seized was ascertained and appellant was charged with its value. The \$600.00 paid to Holm by the school board was charged against appellant because it was claimed it had been used on the Iowa job. The decree in this respect is erroneous for the reason that it goes beyond the question at issue, namely, the ownership of the \$2135.00 brought into court

Nor do we think it necessary to determine in detail whether appellant claimed, or could maintain, its rights under the seizure as provided in the application for the bond; or whether it relied on its right of subrogation, and thus made an election as claimed by appellee. Even though, under some circumstances, a seizure might be deemed an election not to rely upon the right of subrogation, still, as in this case, where the application for the bond provided for both remedies, and they are not inconsistent, they may be regarded as concurrent and cumulative remedies and both may be pursued at the same time.

appellant elected its remedy, all of which remedies must be
available to the applicant; that the maxim of "he who seeks
equity must do equity" requires that appellant restore appellee
to the same position it was in before appellee seized the goods
in full contrary to the law.

It will not be necessary to consider in detail each
of these alternative claims. The question for determination was
the ownership of the \$2135.00 brought into court. It was not
the province of the court to make a general accounting between
the parties and decree the payment of the balance found due out
of a money brought into court which was, in fact, the property
of appellee in the hands of any equitable claim thereon in
favor of appellee. *See* *Wesley vs. Jones*, 231 Ill. 387; *Galpin vs. City*
of Chicago, 230 Ill. 27. Notwithstanding this rule of law the
court made an accounting between the parties. The reasonable
value of the property seized was ascertained and appellant was
charged with its value. The \$200.00 paid to him by the school
board was charged against appellant because it was claimed it
had been used on the lower job. The decree in this respect is
erroneous for the reason that it goes beyond the question of
issue, namely, the ownership of the \$2135.00 brought into court.

Now do we think it necessary to determine in detail
whether appellant claims, or could maintain, its rights under
the seizure as provided in the application for the bond; or
whether it relied on its right of subrogation, and thus made an
election as claimed by appellee. *See* *Wesley vs. Jones*, *supra*.
In circumstances, a seizure might be deemed an election not to
rely upon the right of subrogation, still, as in this case,
where the application for the bond provided for both remedies,
and they are not inconsistent, they may be regarded as concurrent
and cumulative remedies and both may be pursued at the same time.

But whatever may be the correct rule under these circumstances, there can be very little doubt that so far as the fund in this case is concerned, that the right to the money earned under the contract of appellant with the school board for the completion of the contract belongs to appellant without regard to the question of the lawfulness of the seizure of material and tools. At the time of the default by Holm it is apparent that the building was largely completed. Only \$11,550.50 was spent by appellant in completing the job. The evidence does not show the exact financial status of Holm with the school board. It is apparent, however, that he had been paid in full for work done up to that time. No unpaid claim appears in evidence for labor or material up to the time of the default. Immediately after the default, appellant, by its representative, appeared upon the scene. There is no evidence that appellant knew of the outstanding order of appellee which had never been accepted by formal action of the school board. Notwithstanding appellant's right under the application for the bond to seize the tools and material, and to be subrogated to the rights of Holm, appellant saw fit to enter into a written contract with the school board to complete the work. In pursuance of that contract appellant did complete the work to the satisfaction of the school board and the building was accepted by the school board. The school board paid \$6500.00 for a part of this work and the \$2135.00 in question remains unpaid. This amount became due after the default, was for labor and material used in completing the contract, and was due under the contract entered into by appellant and the school board after the default. If the money involved was due to Holm at the time of the default, a different question would be presented, but because of the fact that it was earned by appellant after the default and by virtue of the

But whatever may be the correct legal view, it is clear that there can be very little doubt that as far as the fact in this case is concerned, that the right to the money should belong to the appellant. The appellant was the owner of the building at the time of the contract and it was his duty to see that the building was properly insured. At the time of the contract it was his duty to see that the building was properly insured. It is apparent, however, that he had been paid in full for work done up to that time. No unpaid claim appears in evidence for labor or material up to the time of the default. Immediately after the default, appellant, by its representative, appeared upon the scene. There is no evidence that appellant knew of the existing order of appellee which had never been accepted by formal action of the school board. Notwithstanding appellant's right to the building for the bond to seize the tools and materials, and to be subrogated to the rights of Holm, appellant saw fit to enter into a written contract with the school board to complete the work. In pursuance of that contract appellant did complete the work. The building was accepted by the school board. The school board paid \$6500.00 for a part of this work and the \$2135.00 in question remains unpaid. This amount became due after the default, was for labor and material used in completing the contract, and was due under the contract entered into by appellant and the school board after the default. If the money involved was due to Holm at the time of the default, a different question would be presented, but because of the fact that it was earned by appellee after the default and by virtue of the

contract between appellant and the school board, it was the property of appellant regardless of all other questions in the case, and for that reason the chancellor was in error in decreeing otherwise.

The decree will be reversed and the cause remanded.

Reversed and Remanded.

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245 I.A. 638#4

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. ~~AUGUSTUS A. PARTLOW~~ FRANKLIN H. BOGGS Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 29 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

at Ottawa, on Tuesday, the 21st day of April, in

the opinion of the Court was filed in the
ice of said Court, in the words and figures

April Term 1927

Ernest Brook, as Trustee, etc., and)	
M. A. Carmack,)	
(Complainants) Appellees,)	
-vs-	)	Appeal from
Pistakee Boat and Engine Company	)	Circuit Court
et al.,	)	Lake County.
Defendants,)	
Pistakee Boat and Engine Company)	
Appellants.)	

Jett, P. J.

On April 16th, 1925, the Circuit Court of Lake County entered a decree of foreclosure on a trust deed dated March 26th, 1919, executed by Pistakee Boat and Engine Company, appellant, in favor of appellees from which an appeal was prosecuted to the Appellate Court of the Second District where the decree appealed from was affirmed. The mandate of the Appellate Court was filed in the Circuit Court and the cause was redocketed, whereupon complainants, appellees herein, appeared in the Circuit Court of Lake County on August 30th, 1926 and moved the court to allow appellees \$10.00 docket fee, advanced by said appellees to the clerk of the Appellate Court, Second District, on the appeal, and the further sum of \$150.56, premium paid on two policies of insurance on the building and machinery covered by the trust deed foreclosed, and a further sum of \$25.00 as solicitor's fees for services rendered on the hearing of the motion made by appellees in the said Circuit Court of Lake County.

It appears that on August 30th, 1926, the Circuit Court of Lake County entered an order holding that under the provisions of the trust deed foreclosed, appellees were entitled

provisions of the trust deed foreclosed, appellees were entitled

Court of Lake County entered an order holding that under the

It appears that on August 30th, 1926, the Circuit

Court of Lake County.

hearing of the motion made by appellees in the said Circuit

sum of \$25.00 as solicitor's fees for services rendered on the

machinery covered by the trust deed foreclosed, and a further

premium paid on two policies of insurance on the building and

Second District, on the appeal, and the further sum of \$150.56,

advanced by said appellees to the clerk of the Appellate Court,

1926 and moved the court to allow appellees \$10.00 docket fee,

appeared in the Circuit Court of Lake County on August 30th,

was rebooked, whereupon complainants, appellees herein,

Appellate Court was filed in the Circuit Court and the cause

the decree appealed from was affirmed. The mandate of the

presented to the Appellate Court of the Second District where

appealant, in favor of appellees from which an appeal was

2dth, 1919, executed by Platakes Boat and Engine Company,

entered a decree of foreclosure on a trust deed dated March

On April 16th, 1925, the Circuit Court of Lake County

left, P. J.

Appellants.

Platakes Boat and Engine Company

Respondents.

Platakes Boat and Engine Company
et al.,

-vs-

(Complainants) Appellees.

Ernest Frost, as Trustee, etc., and
M. A. Gernert,

April Term 1927

7734

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Appeal from
Circuit Court
Lake County.

to recover the \$10.00 advanced as docket fee, the \$150.56 premium paid on two policies of insurance and the further sum of \$25.00 as solicitor's fees for services rendered on the hearing of the motion, and the appellant was ordered to pay the same to appellees within ten days. To reverse said order and decree this appeal is prosecuted.

It is insisted by appellees in support of said decree, that under the provisions of the trust deed in question, all of the costs incident to the litigation necessary to the foreclosure of said trust deed, and the solicitors fees incurred by appellees and any insurance premiums which it may have paid to keep alive the insurance on the property, either before or after the decree of sale, unless the property had been sold or appellees had become the purchaser, or, we take it, some one else had been the purchaser and paid appellees in full, they would be entitled to recover the amount against the maker of said trust deed. The decree entered by the chancellor does not attempt to make the amount so decreed to be paid by appellant a part of the amount due on the foreclosure of said trust deed and to have the same satisfied out of the proceeds of the sale of said property but simply orders that the appellant pay to appellees the amount so found within ten days. Appellees have not submitted any authority to support the position assumed, and we know of none that would authorize the court, in this summary manner, to reimburse appellees for the amount incurred by him for the purposes as mentioned in said decree. The decree of foreclosure, from which the former appeal was prosecuted, was a final decree and fixed the rights of the parties. We know of no rule that would allow the court to thereafter, by virtue of the provisions in the trust deed foreclosed, assess solicitors fees against the maker of the mortgage on motion as

to recover the \$10.00 advanced as docket fee, the \$150.50
premium paid on two policies of insurance and the further sum
of \$25.00 as solicitor's fees for services rendered on the
hearing of the motion, and the appellant was ordered to pay
the same to appellees within ten days. To reverse said order
and decree this appeal is prosecuted.

It is insisted by appellees in support of said decree,
that under the provisions of the trust deed in question, all
of the costs incident to the litigation necessarily to the fore-
closure of said trust deed, and the solicitors fees incurred
by appellees and any insurance premiums which it may have paid
to keep alive the insurance on the property, should be paid or
after the decree of sale, unless the property had been sold or
appellees had become the purchaser, or, we take it, some one
else had been the purchaser and paid appellees in full, they
would be entitled to recover the amount against the maker of
said trust deed. The decree entered by the chancellor does
not attempt to make the amount so decreed to be paid by appellant
a part of the amount due on the foreclosure of said trust deed
and to have the same satisfied out of the proceeds of the sale
of said property but simply orders that the appellant pay to
appellees the amount so found within ten days. Appellees have
not submitted any authority to support the position assumed,
and we know of none that would authorize the court, in this
summary manner, to reimburse appellees for the amount incurred
by him for the purposes as mentioned in said decree. The decree
of foreclosure, from which the former appeal was prosecuted, was
a final decree and fixed the rights of the parties. We know
of no rule that would allow the court to thereafter, by virtue
of the provisions in the trust deed foreclosed, assess
solicitors fees against the maker of the mortgage on motion as

was done in this proceeding.

As to the \$10.00 item, this was adjudged as costs against appellant in this court. That item could be collected through the office of the clerk of this court. As to the matter of insuring the property, it will be observed that the record does not disclose whether or not the property has been sold under the decree of foreclosure heretofore entered, but whether sold or not, the court has no jurisdiction to enter an order or decree reimbursing appellees for said insurance premiums. We are not at this time passing on the question as to whether appellees would be entitled to recover for premiums paid in order to keep the premises insured until the decree had been satisfied, either by payment or by the purchase of the property by himself. That question is not before us and we are not in any wise passing on the same.

We are, therefore, unable to concur in the conclusion reached^{by}/the Circuit Court of Lake County.

We conclude, therefore, that the Circuit Court of Lake County was in error in granting the order appealed from and the same will be reversed and the cause remanded.

Reversed and Remanded.

was done in this respect.

As to the \$10.00 fee, this was adjudged as costs and the fee was paid by the party who brought the action.

The item could be collected against the party who brought the action.

As to the matter of the office of the clerk of this court, it will be necessary to look into the record of the property, it will be necessary to look into the record of the property, it will be necessary to look into the record of the property.

There are no records of foreclosures heretofore entered, but whether or not there are records of foreclosures heretofore entered, it will be necessary to look into the record of the property.

The court has no jurisdiction to enter an order or judgment in this case.

We are remitting the appeal for said insurance premiums. We are remitting the appeal for said insurance premiums. We are remitting the appeal for said insurance premiums.

At this time, we are on the question as to whether or not the party is entitled to recover for premiums paid in this case.

The party is entitled to recover for premiums paid in this case. The party is entitled to recover for premiums paid in this case. The party is entitled to recover for premiums paid in this case.

There is no question as to whether or not the party is entitled to recover for premiums paid in this case. There is no question as to whether or not the party is entitled to recover for premiums paid in this case.

That question is not before us and we are not in a position to answer it.

There is no question as to whether or not the party is entitled to recover for premiums paid in this case. There is no question as to whether or not the party is entitled to recover for premiums paid in this case.

We are, therefore, unable to answer in the conclusion of this case.

The Circuit Court of Lake County, Wisconsin, is hereby affirmed.

We conclude, therefore, that the Circuit Court of Lake County, Wisconsin, is hereby affirmed.

There is no error in granting the order appealed from. There is no error in granting the order appealed from. There is no error in granting the order appealed from.

and the same will be reversed and the same remanded.

Reversed and Remanded.

of the property in the case of the party who brought the action.

of the property in the case of the party who brought the action.

of the property in the case of the party who brought the action.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty _____

Clerk of the Appellate Court

607/2457 I.A. 638⁴⁵

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 29 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

held at Chicago, on Tuesday, the fifth day of
and sold one thousand nine hundred and twenty-seven
for the Second District of the State of Illinois;

Hon. THOMAS M. JETT, Presiding Justice

Hon. NORMAN I. JONES, Justice

Hon. FRANKLIN H. ROGERS, Justice

JUSTUS L. JOHNSON, Clerk

FLOYD S. CLARK, Reporter

with opinion of the
of said Court, in

April Term 1927.

Leaf River State Bank,
Appellant,

-vs-

Jesse W. Paul,
Appellee.

Appeal from the Circuit Court
of Winnebago County.

Jett, P. J.

This is an appeal by the Leaf River State Bank, appellant, from a judgment rendered against it for costs, in a suit it brought against Jesse W. Paul, appellee, on a judgment note for \$4500, bearing date April 15, 1924. Judgment was entered by confession in the Circuit Court of Winnebago County in favor of appellant and against appellee on the said note for \$4500 which, on the application of appellee, was vacated and he was given leave to plead. Several pleas were filed setting up various defenses, among them, the want of consideration, an agreement by the appellant that no liability should be attached to appellee by reason of his signing the note in question. A jury trial was had with a finding in favor of appellee. Motion for a new trial was denied and judgment rendered as aforesaid and this appeal followed.

It appears that appellee, Paul, was surety on a certain note for \$4500, F. E. Brantner being the principal. Brantner had been doing business with the Leaf River State Bank, appellant, and also the Commercial Bank of Forreaston. The business of F. E. Brantner had been unsuccessful and he resorted to the practice of the kiting of checks. When Brantner was no longer permitted to indulge in the kiting of

April Term 1934.

Leak River State Bank,

Appellant,

-vs-

Jesse W. Paul,

Appellee.

Appeal from the Circuit Court
of Winnebago County.

Just, P. J.

This is an appeal by the Leak River State Bank, appellant, from a judgment rendered against it for costs, in a suit it brought against Jesse W. Paul, appellee, on a judgment note for \$1500, bearing date April 18, 1934. Judgment was entered by the Circuit Court of Winnebago County in favor of appellant and against appellee on the said note for \$1500 which, on the application of appellee, was vacated and he was given leave to plead. Several pleas were filed setting up various defenses, among them, the want of consideration, an agreement by the appellant that no liability should be attached to appellee by reason of his signing the note in question. A jury trial was had with a finding in favor of appellee. Motion for a new trial was denied and judgment rendered as aforesaid and this appeal followed.

It appears that appellee, Paul, was surety on a certain note for John W. E. Brantner being the principal. Brantner had been doing business with the Leak River State Bank, appellant, and also the Commercial Bank of Winnebago. The business of W. E. Brantner had been discontinued and he resorted to the practice of his kind of cheating. When Brantner was no longer permitted to continue in the office of

checks, it was found that he was indebted to the appellant bank in the sum of \$30,000 or more. It is the contention of the appellant that the note sued on in this proceeding was obtained from Brantner and Paul to reduce the amount of Brantner's indebtedness. It is insisted by Paul that the note was an accommodation one and his signature was obtained upon the assurance of the officers of the bank that it would hold it for a few days only and then return it to him; that the purpose of the bank in obtaining the note was to protect itself against the possible appearance of a bank examiner before some means could be found for taking care of Brantner's overdraft.

The record discloses that a number of witnesses were sworn and examined on each side. From an examination of the record they all appear to have been credible witnesses. There is a very great conflict in the testimony.

The evidence shows that on the evening of April 17, 1924, being two days after the date of the note sued on in this cause, certain officials of appellant bank were at the home of the father of F. E. Brantner for the purpose of making a settlement of the overdraft in question. On that occasion computations were made and it was determined that the amount due the appellant bank was \$33,040. Whereupon Charles Brantner, the father of F. E. Brantner, executed a mortgage or deed of trust to the appellant bank to secure the indebtedness. It is insisted by appellee that on this occasion, in making the computation, no credit was given on the overdraft on account of the Paul note and that it was stated by the officials of the appellant bank that after the mortgage was executed the Paul note, together with one other note for \$5000, was to be returned. Appellant insists that the Paul note was taken into consideration

checked, it was found that the sum of \$20,000 or more was in the possession of the appellant. It is the contention of the appellant that the note was not given on in this proceeding was obtained from Brammer and Paul to reduce the amount of Brammer's indebtedness. It is insisted by Paul that the note was an accommodation one and his signature was obtained upon the statement of the officers of the bank that it would be paid for a few days only and then return it to him; that the purpose of the bank in obtaining the note was to protect itself against the possible appearance of a bank examiner before the note was paid. This is an attempt to show that the note was given for the purpose of taking care of Brammer's over-extended condition, from a financial point of view. It is pointed out that the record discloses that a number of witnesses were sworn and examined on each side. From an examination of the record they all appear to have been credible witnesses. There is a very great conflict in the testimony. The evidence shows that on the evening of April 14, 1914, being two days after the date of the note was given on in this case, certain officials of appellant bank were at the home of the father of T. E. Brammer for the purpose of making a settlement of the overdraft in question. On that occasion negotiations were made and it was determined that the amount of the overdraft was \$28,040. Whereupon Charles Brammer, the father of T. E. Brammer, executed a mortgage or deed of trust to the appellant bank to secure the indebtedness. It is insisted by appellee that on this occasion, in making the computation, no credit was given on the overdraft on account of the Paul note and that it was stated by the officials of the appellant bank that after the mortgage was executed the Paul note, together with one other note for \$5000, was to be returned. Appellant insists that the Paul note was taken into consideration

at the meeting on the 17th of April, 1924 at the home of Charles Brantner.

There is testimony in the record tending to sustain the contention of appellee, that the officers of the appellant bank had stated, previous to the time of the execution by Paul of the note in question, that they were desirous of having the note for only a short time and that they would return it in a few days and that appellee would not be liable on the same. The officers of the bank deny that they ever promised to return the ~~same~~ ^{note} and deny also that they said that they wanted the note only for a few days because of the fact they were expecting the bank examiner to appear soon.

The question as to whether or not the appellee was to incur any liability, by signing the note, to appellant was one of the strongly contested points in the evidence in this cause. The number of witnesses were about equal and the testimony was clear and positive. The testimony also bore upon the question as to what was said at the time and just before the note in controversy was executed. While the testimony on the part of the appellee tends to support his contention, it was disclosed that the testimony introduced by the appellant tends also to sustain its contention. If the contention of the appellee is correct, then the verdict of the jury should be sustained, otherwise not. In the case of Strauss v. Bank of Elmhurst, 254 Ill. 185, at page 186, the court said:

"If the note relied on as a set off, was made, executed and delivered to the bank without any consideration and upon the agreement that appellee should never be required to pay said note, it is difficult to say how a recovery could be sustained by the bank. If there was no consideration for the note the bank cannot be a holder in due course for value. There are some propositions that are so well settled and clear that any attempt at argument in support of them is a useless expenditure of time. That a promissory note made and executed without consideration and received by the payee upon an

at a meeting on the 17th of April, 1934 at the home of Charles

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agreement that the maker should never be called upon to pay the same is invalid in the hands of such payee and cannot be enforced against the maker is a proposition of that character."

On the other hand, appellant insists that there were no promises of any kind or character made, then in view of that fact this was peculiarly a case for a jury. It was for the jury to say wherein the truth layed.

In view of the fact, therefore, that the evidence was conflicting and it was submitted to a jury, and the verdict of the jury has met with the approval of the trial judge, we are not disposed to disturb it. We are not prepared to say that the verdict is against the manifest weight of the evidence. We find no reversible error in the record and are of the opinion that the judgment of the Circuit Court of Winnebago County should be affirmed, which is accordingly done.

Judgment Affirmed.

In the other hand, appellant insists that there were no purchases of any kind or character made, then in view of that fact there was possibly a case for a jury. It was for the jury to say whether the truth lay.

In view of the fact, therefore, that the evidence was conflicting and it was submitted to a jury, and the verdict of the jury has not been approved by the trial judge, we are not inclined to disturb it. It is not proper to say that the verdict is against the weight of the evidence. We find no reversible error in the record and one of the opinions of the Circuit Court of Winnebago County shall be affirmed, which is accordingly done.

Dendroica coronata

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

mit in der ersten Linie
geordnet zu sein.

6072a

AT A TERM OF THE APPELLATE COURT,

245 T.A. 639 #1

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 23 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

at 10:30 a.m. on the 1st day of April, 1901
of our lot, and
A for the second district of the

Hon. THOMAS M. JETT, President
Hon. NORMAN F. JONES, Justice
Hon. FRANKLIN R. HOGGS, Justice
JUSTUS L. JOHNSON, Clerk
FLOYD S. CLARK, Sheriff

that 22 persons

Term No. 18.

7733

Agenda No. 15.

In The
APPELLATE COURT OF ILLINOIS,
Second District.

APRIL TERM, A. D. 1927.

THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant in Error,
-vs-
HUGH HASKINS,
Plaintiff in Error.

Error
to the
County Court of
Knox County

OPINION by BOGGS, J.

Plaintiff in error was tried and convicted in the county court of Knox County on an information charging him with the sale of intoxicating liquor contrary to the provisions of the Illinois Prohibition Act. He was fined \$500 and costs, and ordered committed to the county jail for a term of six months. To reverse said judgment, this writ of error is prosecuted.

The information was filed on March 5th, 1926, and charged that plaintiff in error, on February 27th, 1926, at and within Knox County, unlawfully sold intoxicating liquor. ~~In~~ In support of this charge, two witnesses to the alleged sale were produced by the People, one Al Miller and one John Leasenby.

Miller testified that on February 27th, 1926, at about the hour of 11:30 in the forenoon, he and Leasenby went

753

APPELLATE COURT OF ILLINOIS,
Second District.

APRIL TERM, A. D. 1927.

County Court of
Knox County

THE PEOPLE OF THE STATE
OF ILLINOIS,
Plaintiff in Error,
-vs-
JAMES HARTLEY,
Defendant in Error.

OPINION BY ROGERS, J.

Plaintiff in error was tried and convicted in the
county court of Knox County on an information charging him with
the sale of intoxicating liquor contrary to the provisions of
the Illinois Prohibition Act. He was fined \$500 and costs, and
ordered committed to the county jail for a term of six months.
To reverse said judgment, this writ of error is presented.
The information was filed on March 5th, 1926, and
charged that plaintiff in error, on February 27th, 1926, at and
within Knox County, unlawfully sold intoxicating liquor. ~~He~~
In support of this charge, two witnesses to the alleged sale
were produced by the People, one Al Miller and one John Besenbary.
Miller testified that on February 27th, 1926, at

about the hour of 11:15 in the forenoon, he and Besenbary

to the home of a Mrs. Hopkins in Galesburg; that Mrs. Hopkins called on the phone, that he and Leasenby waited a time, and that plaintiff in error came there and brought with him a gallon container of alcohol. He testified: "We talked a little about it and I told him (plaintiff in error) I wanted more later. He told me how to get it. We first talked about what I wanted. Said I wanted a gallon of alcohol. He said it would be \$14. I said that was too much, could get it cheaper. He said his was the best. I said all right, and gave him \$14. Said I would be back after more." He further testified that he tasted the contents of the container which he obtained from plaintiff in error, and that it was intoxicating; that he at once gave the container with the alcohol to the sheriff.

On cross examination, Miller stated that he had been employed by the sheriff of said county in that case. He was also cross examined as to where he had been living and what he had been doing prior to his employment in this case. The evidence developed that he had had no employment to speak of for some time past, except as he was employed by sheriffs or other officers in Knox and other counties to procure evidence of violations of the prohibition laws.

The witness Leasenby resided in Galesburg and was a man about seventy years of age. He testified that he was present and saw Miller purchase said alcohol from plaintiff in error, and pay him \$14 therefor. He also testified that he was employed by the sheriff to procure evidence in this case, and had also been employed by the sheriff on a few cases prior thereto; that he was engaged and had been for several years last past in the trucking and dray business.

One Hawthorne, a witness on behalf of the People, tes-

to the fact that Mrs. Hopkins called on the phone, that he and Leavenworth waited a time, and that Plaintiff in error came there and brought with him a gallon container of alcohol. He testified: "We talked a little about it and I told him (Plaintiff in error) I wanted more later. He told me how to get it. We first talked about what I wanted. I said I wanted a gallon of alcohol. He said it would be \$14. I said that was too much, could get it cheaper. He said his was the best. I said all right, and gave him \$14. He said I would be back after more." He further testified that he tested the contents of the container which he obtained from Plaintiff in error, and that it was intoxicating; that he at once gave the container with the alcohol to the sheriff.

On cross examination, Miller stated that he had been employed by the sheriff of said county in that case. He was also cross examined as to where he had been living and what he had been doing prior to his employment in this case. The evidence developed that he had had no employment to speak of for some time past, except as he was employed by sheriffs or other officers in Knox and other counties to procure evidence of violations of the prohibition laws.

The witness Leavenworth resided in Galveston and was a man about seventy years of age. He testified that he was present and saw Miller purchase said alcohol from Plaintiff in error, and pay him \$14 therefor. He also testified that he was employed by the sheriff to procure evidence in this case, and had also been employed by the sheriff on a few cases prior thereto; that he was engaged and had been for several years last past in the trucking and dry business.

tified that he was a druggist; that he made a test of the contents of the liquid in question, and that it tested from 70 to 75% alcohol. Wilson, the sheriff, also went on the stand and testified to having had said liquor in his possession, and as to having had the same tested by the witness Hawthorne.

Plaintiff in error testified in his own behalf to the effect that he never sold any liquor to Miller, and that he had never seen Miller or Leasenby until after the date of said alleged sale. He further testified that on the morning of February 27th, and up until about 12:20 that afternoon, he was doing plumbing work for one Howard Messmore. Messmore testified on behalf of plaintiff in error that plaintiff in error had been so employed; that he came to work about 8 o'clock and stayed until about 12, and that he was with him practically all the time during that morning.

Mrs. Hopkins testified that Miller and Leasenby were at her home on the day in question, and stated that she called up Mrs. Haskins and asked for plaintiff in error, but that Mrs. Haskins stated he was not there. She further testified that Haskins did not come to her home that morning, and that he did not sell any liquor to Miller there at her home. This witness testified on cross examination that she had been arrested for selling intoxicating liquor, and that she did not know whether or not her arrest had been procured on a complaint made by Miller.

Two witnesses testified on behalf of plaintiff in error that the general reputation of Miller when he lived at Macomb, with the people in that community who knew him, was bad for truth and veracity. Mrs. Orie Holton, one of these witnesses, testified that Miller had turned her husband in for bootlegging. She also stated that Miller had been in jail on a vagrancy

testified that he was a burglar; that he made a test of the contents of the liquid in question, and that it tested from 70 to 75% alcohol. Wilson, the sheriff, also went on the stand and testified to having had said liquor in his possession, and as to having had the same tested by the witness Hawthorne.

Plaintiff in error testified in his own behalf to the effect that he never sold any liquor to Miller, and that he had never seen Miller or Lessner until after the date of said alleged sale. He further testified that on the morning of February 25th, and up until about 12:30 that afternoon, he was doing plumbing work for one Howard Messmore. Messmore testified on behalf of plaintiff in error that plaintiff in error had been so employed; that he came to work about 10 o'clock and stayed until about 12, and that he was with him practically all the time during that morning.

Mrs. Hopkins testified that Miller and Lessner were at her home on the day in question, and stated that she called up Mrs. Hastings and asked for plaintiff in error, but that Mrs. Hastings stated he was not there. She further testified that Hastings did not come to her home that morning, and that he did not sell any liquor to Miller there at her home. This witness testified in cross examination that she had been arrested for selling intoxicating liquor, and that she had been arrested for not her arrest had been procured on a complaint made by Miller.

Two witnesses testified on behalf of plaintiff in error that the general reputation of Miller when he lived at 1230, with the people in that community who knew him, was bad for truth and veracity. Mrs. Orie Holton, one of these witnesses, testified that Miller had turned her husband in for bootlegging. She also stated that Miller had been in jail on a veracity

charge in Macomb. Harry Vance, the other witness, testified on cross examination that he had been arrested for bootlegging, on a complaint made by Miller.

In addition to the foregoing, plaintiff in error also offered in evidence the hotel register of the Custer Hotel at Galesburg, tending to show that Miller had not been registered there, as claimed by him.

In rebuttal the People offered in evidence the record of the circuit court of Knox County, to the effect that plaintiff in error had entered a plea of guilty to a charge of grand larceny in that court, and that judgment had been entered thereon.

It is first contended by plaintiff in error for a reversal of said judgment, that the court erred in giving the ninth and tenth instructions given on behalf of the People. These instructions are as follows:

"9. The Court instructs the jury that the exact time of sale as alleged in the Information need not be proven; but the People are only confined to a period within eighteen months prior to the filing of the Information herein, and if the jury believe from all the evidence, beyond a reasonable doubt, that the defendant did unlawfully sell intoxicating liquor at any time during said period of time above mentioned, then the jury may find the Defendant guilty."

"10. The Court instructs the jury that the burden of proof of an alibi in a criminal case is upon the accused, and in order to maintain that defense he is bound to show, in its support, such facts and circumstances as are sufficient, when considered in connection with all the other evidence in the case, to create in the minds of the jury a reasonable doubt of the truth of the charge against him.

"The reasonable doubt which will acquit a defendant when his defense is an alibi, is a reasonable doubt of guilt

change in name. Harry Vance, the other witness, testified on cross examination that he had been arrested for possession of a certain amount of money made by Miller.

In addition to the foregoing, plaintiff in error also offered in evidence the hotel register of the Chester Hotel at Salisbury, tending to show that Miller had not been registered there, as claimed by him.

In rebuttal the People offered in evidence the record of the circuit court of Knox County, to the effect that plaintiff in error had received a piece of property to a charge of grand larceny in that court, and that judgment was rendered there.

It is first contended by plaintiff in error that reversal of said judgment, that the court erred in giving the ninth and tenth instructions given on behalf of the People. These instructions are as follows:

"9. The Court instructs the jury that the exact time of sale as alleged in the information need not be proven; but the People are only entitled to a period within eighteen months prior to the filing of the information herein, and if the jury believe from all the evidence, beyond a reasonable doubt, that the defendant did unlawfully sell intoxicating liquor at any time during said period of time above mentioned, then the jury may find the defendant guilty."

"10. The Court instructs the jury that the burden of proof of an alibi in a criminal case is upon the defendant, and in order to maintain that defense he is bound to show, in his support, such facts and circumstances as are sufficient, when considered in connection with all the other evidence in the case, to create in the minds of the jury a reasonable doubt of the truth of the charge against him.

"The reasonable doubt which will acquit a defendant when he believes in an alibi, is a reasonable doubt of guilt

which arises from a consideration by the jury of all the evidence, as well that touching the question of the alibi as the criminating evidence introduced by the prosecution."

It is not contended that the ninth instruction does not state a correct principle of law as a general proposition, but it is insisted that in this case, inasmuch as it was only contended that plaintiff in error had made one sale, and which the evidence tended to show was on February 27th, that therefore it was erroneous to instruct the jury that the People were not confined to the date alleged in the information, but that proof of the sale of liquor at any time within eighteen months prior to the filing of the information was sufficient. We are of the opinion and hold that the court did not err in giving this instruction, as the jury would not be misled thereby.

It is the contention of counsel for plaintiff in error that the tenth instruction is erroneous in stating that the burden of proof of an alibi in a criminal case is on the accused. We are of the opinion and hold that this language should not have been used, but, taken in connection with the remainder of the instruction, plaintiff in error was not prejudiced thereby. The instruction as a whole correctly informed the jury that if the evidence in support of an alibi, together with the other evidence in the case, was sufficient to raise a reasonable doubt of the guilt of the accused, it was sufficient. This holding is in keeping with the law as laid down in Carlton v. People, 150 Ill. 181, and Hauser v. People, 210 Ill. 253. We therefore hold that the court did not commit any reversible error in the giving of said instructions.

It is next contended by counsel for plaintiff in error that the court should have granted a new trial on the ground of newly-discovered evidence.

which would be a violation of the law of the State, as well as a violation of the public policy of the State, and which would be a violation of the public policy of the State.

It is also contended that the ninth instruction does not state a correct principle of law as a general proposition, but it is contended that it is correct in this case, because it is correct in this case.

contended that plaintiff's error had made one sale, and which the evidence tended to show was on January 27th, that therefore it was erroneous to instruct the jury that the sale was not correct in the information, but that proof of the sale of liquor at any time within eighteen months prior to the filing of the information was sufficient. We are of the opinion that the court did not err in giving this instruction, as the jury would not be misled thereby.

It is the contention of counsel for plaintiff in error that the instruction is erroneous in stating that the burden of proof of an alibi in a criminal case is on the accused. We are of the opinion and hold that this language should not have been used, but, taken in connection with the remainder of the instruction, plaintiff is not prejudiced thereby.

Instruction as a whole correctly informed the jury that if the evidence in support of an alibi, together with the other evidence in the case, was sufficient to raise a reasonable doubt of the guilt of the accused, it was sufficient. This holding is in keeping with the law as laid down in People v. Garlin, 100 Ill. 181, and People v. People, 210 Ill. 252. We therefore hold that the court did not commit any reversible error in the giving of said instruction.

It is next contended by counsel for plaintiff in error that the court should have granted a new trial on the ground of newly-discovered evidence.

It is contended that the court should have granted a new trial on the ground of newly-discovered evidence. It is contended that the court should have granted a new trial on the ground of newly-discovered evidence. It is contended that the court should have granted a new trial on the ground of newly-discovered evidence.

An affidavit in support of this motion was made by Guy Haskins, brother of plaintiff in error, to the effect that he himself had delivered the alcohol in question to Miller, his language in that connection being: "That it was this affiant and not Hugh Haskins who delivered said can of alcohol to Al Miller at the said Hopkins residence." Mrs. Hopkins made an affidavit in support of said motion, to the effect that she recognized Guy Haskins "as the same person who came to her residence between 11:30 and 12 o'clock noon of February 27th, 1926, while Al Miller and John Leasenby were there." Plaintiff in error made affidavit to the effect that he had no knowledge of this evidence until after the trial of said cause. Leo P. Baird, counsel for plaintiff in error, made affidavit that he had no knowledge of this newly-discovered evidence until after said trial.

It might be observed that Mrs. Hopkins, in her testimony on the trial of said cause, stated: "Mr. Hugh Haskins was not in my house on the 27th of February. Nobody came in to my house on February 27th, 1926, when Mr. Leasenby and Miller were there."

The court overruled the motion for a new trial and rendered judgment as above set forth, and it is strenuously insisted that in so doing the court committed reversible error. It is conceded by counsel for plaintiff in error that the evidence in this case is sharply conflicting; that if the witnesses Miller and Leasenby are to be believed, the evidence as to the guilt of plaintiff in error is conclusive. We would therefore not be warranted in reversing the judgment on the ground that the evidence is not sufficient to support the verdict, unless we are able to state that there is clearly a reasonable doubt of the accused person's guilt. People v. True, 314 Ill. 89-93, citing: People

an affidavit in support of this motion was made by
Ray Haskins, brother of plaintiff in error, to the effect that
he himself had delivered the alcohol in question to Miller, his
lawyer in that connection being: "That it was this affidavit
and not Ray Haskins who delivered said can of alcohol to Al
Miller at the said Haskins residence." Mrs. Hopkins made an
affidavit in support of said motion, to the effect that she
remembered Ray Haskins "as the same person who came to her
residence between 11:30 and 12 o'clock noon of February 27th,
1926, with Al Miller and John Leasberry were there." Plaintiff
in error made affidavit to the effect that he had no knowledge
of this evidence until after the trial of said cause. The
court, however, for plaintiff in error, said affidavit was not
admitted in evidence of this newly-discovered evidence until after
said trial.

It might be observed that Mrs. Hopkins, in her affidavit
on the trial of said cause, stated: "Mr. Ray Haskins was
not in my house on the 27th of February. Nobody came in to my
house on February 27th, 1926, when Mr. Leasberry and Miller were
there."

The court overruled the motion for a new trial and
rendered judgment as above set forth, and it is strenuously in-
sisted that in so doing the court committed reversible error.
It is conceded by counsel for plaintiff in error that the evidence
in this case is sharply conflicting; that if the witnesses Miller
and Leasberry are to be believed, the evidence as to the guilt of
plaintiff in error is established. On the other hand the evidence
presented in support of the motion for a new trial is such as to
show that there is clearly a reasonable doubt as to the
guilt of plaintiff in error. People v. True, 314 Ill. 60-62, 210 Ill. 20-21.

v. Grosenheider, 266 Ill. 324; People v. McCann, 247 Ill. 130; People v. Fisher, 303 Ill. 594.

In People v. True, *supra*, the court at page 93, in discussing this question, says:

"Where a case depends merely upon the credibility of witnesses who on one side identify the accused persons as the guilty parties, and on the other testify to an alibi, this court will not substitute its judgment for that of the jury, unless it is clear that the jury has made a mistake or acted from passion or prejudice." Citing People v. Fisher, *supra*; People v. Hildebrand, 307 Ill. 544; People v. McGuirk, 312 Ill. 257.

Whatever may be urged against the witness Miller, there is nothing in this record at all, showing that the witness Leasenby is not worthy of belief.

In order to justify a new trial for newly-discovered evidence, the evidence must be such as will probably change the result; it must have been discovered since the trial, and such as could not have been discovered before the trial by due diligence; it must have been material, and not merely cumulative. People v. Williams, 242 Ill. 197; People v. Dabney, 315 Ill. 320.

We are not prepared to hold that the court erred in refusing to grant a new trial in this case on account of the alleged newly-discovered evidence. We have called attention to the inconsistency between Mrs. Hopkins' affidavit and her testimony, and we can readily see how the affidavit of Guy Haskins to the effect that he, instead of plaintiff in error, delivered the alcohol in question, would not appeal very strongly to the trial court.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

v. Stenhouse, 242 Ill. 384; People v. McGinnis, 242 Ill. 380;

People v. Fisher, 203 Ill. 594.

In People v. Tamm, supra, the court said:

"It is not the duty of the jury to believe the testimony of a witness unless it is supported by the evidence."

"There is a presumption that the jury will believe the testimony of a witness unless it is supported by the evidence."

Witnesses are on one side of the scale, and on the other, the evidence. This court

will not substitute its judgment for that of the jury, unless it

is clear that the jury has made a mistake or acted from passion

or prejudice." People v. Fisher, supra; People v. McGinnis, supra.

People v. McGinnis, 203 Ill. 544; People v. McGinnis, 212 Ill. 327.

Wherever may be raised against the witness Miller, there

is nothing in this record to show that the witness Miller

is not worthy of belief.

In order to justify a new trial for newly-discovered

evidence, the evidence must be such that it is probable that

the jury would have been differently impressed since the trial, and

as a result not have been discovered before the trial by due diligence;

it must have been material, and not merely cumulative. People v.

Williams, 242 Ill. 197; People v. Doherty, 212 Ill. 320.

We are not prepared to hold that the court erred in

refusing to grant a new trial in this case on account of the

alleged newly-discovered evidence. We have called attention to

the inconsistency between the testimony of the witness Miller

and we can readily see how the jury could have been misled

therein, that he, instead of plaintiff in error, delivered the alcohol

in question, would not appeal very strongly to the trial court.

For the reasons stated and for the reasons of the

trial court will be affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

6073a &
245 L.A. 639 #2
AT A TERM OF THE APPELLATE COURT,

6074a
Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

SE 27 1927 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

THE UNIVERSITY OF CHICAGO
LIBRARY
1000 S. EAST ASIAN BLDG.
CHICAGO, ILL. 60607

RECEIVED
JAN 10 1964

LIBRARY

Term No. 21.

Agenda No. 18.

7737

In The
APPELLATE COURT OF ILLINOIS,
Second District.

APRIL TERM, A. D. 1927:

LENA MOULTON,
Appellee,
-vs-
EUGENE A. MOULTON,
Appellant.

Appeal from the
Kane County
Circuit Court

OPINION by BOGGS, J.

A judgment by confession for \$575.00 was taken by appellee in the circuit court of Kane County on a note, dated January 27th, 1910, for \$500.00, due five years after date, with interest at five per cent per annum, signed by appellant and payable to one M. A. McKey, and bearing the following indorsement: "Pay to the order of Henry T. Moulton without recourse on me. M. A. McKey."

On motion of appellant, said judgment was opened up and leave was given to plead. A plea of the general issue, with notice of special defense, was filed by appellant. A jury was waived, and on the trial a finding and judgment was entered in favor of appellee for the sum of \$500.00. To reverse said judgment, this appeal is prosecuted.

The declaration alleged among other things that the payee in said note, M. A. McKey, indorsed and delivered the same

157

IN THE
APPELLATE COURT OF ILLINOIS,
Second District.

APRIL TERM, A. D. 1927.

Appeal from the
Kane County
Circuit Court

LENA MONTON,
Appellee,
-vs-
EUGENE A. MONTON,
Appellant.

OPINION BY ROGGS, J.

A judgment by confession for \$375.00 was taken by appellee in the circuit court of Kane County on a note, dated January 27th, 1913, for \$400.00, and which was paid with interest at five per cent per annum, subject to appellee's and payee to one E. A. McKey, and assigned to appellee (appellee) "by the order of Henry T. Monton without recourse on me. E. A. McKey."

On motion of appellant, said judgment was opened up and leave was given to plead. A plea of the general issue, with notice of special defense, was filed by appellant. A jury was waived, and on the trial a finding and judgment was entered in favor of appellee for the sum of \$500.00. To reverse said judgment, this appeal is prosecuted.

The declaration alleged among other things that the payee in said note, E. A. McKey, indorsed and delivered the same

to Henry T. Moulton, "who afterwards sold and appointed the said sum to be paid to plaintiff."

Appellee, the wife of Henry T. Moulton and stepmother of appellant, claims to be the owner of said note. She testified, over objection, that prior to her marriage in 1912, Henry T. Moulton, sometimes called Harry Moulton, promised her that he would give her said note, and that soon after their marriage he delivered the same to her, and that said note has been in her possession ever since; that she kept it in a dresser which belonged to her and which was in the room occupied by her and her husband since said time; that from time to time she received, through her husband, interest on said note. When asked whether she had been paid anything on the principal of the note, appellee stated: "No. I don't know whether any part of this \$500.00 was paid to Mr. Moulton. I think the last interest was paid in 1922."

Lena Olson, a daughter of appellee by a former marriage, testified that she saw the note in question a number of times, and stated: "I saw it in her (appellee's) possession, and had it in mine. Mother was called to Indianapolis, and she gave me the note and her insurance papers to keep for her while she was gone. I know of two or three times when father, or Mr. Moulton, would hand it to mother, "Here's the interest, mother, that Gene has sent.""

On behalf of appellant, Henry T. Moulton testified, over objection of appellee's counsel, that he had the note in question prior to his marriage to appellee, but that he never promised to give it to her. He further testified: "After our marriage we kept the note in the dresser drawer; the last time I seen it was in the dining room, in the dresser. There never was any transaction between my wife and myself in which I gave her this note." He further testified that appellant, his son,

to Henry T. Moulton, who it was sold and assigned the said

sum to be paid to plaintiff.

Appellee, the wife of Henry T. Moulton and stepmother

of appellant, claims to be the owner of said note. She testified,

even objection, that prior to her marriage in 1912, Henry T.

Moulton, sometimes called Harry Moulton, promised her that he

would give her said note, and that soon after their marriage he

delivered the same to her, and that said note has been in her

possession ever since; that she kept it in a leather case

to her and while it was in her possession it was not

alike said time; that from time to time she received

her interest on said note. When asked whether she had

been paid anything on the principal of the note, appellee stated:

"No. I don't know whether any part of this \$500.00 was paid to

Mr. Moulton. I think the last interest was paid in 1922."

Irene Olson, a daughter of appellee by a former marriage,

testified that she saw the note in question a number of times,

and stated: "I saw it in her (appellee's) possession, and had

it in mine. Mother was called to Indianapolis, and she gave

me the note and her insurance papers to keep for her while she

was gone. I know of two or three times when father, or Mr.

Moulton, would hand it to mother. "Here's the interest, mother,

that Gene has sent."

On behalf of appellant, Henry T. Moulton testified,

over objection of appellee's counsel, that he had the note in

possession prior to his marriage to appellee, but that he never

promised to give it to her. He further testified: "After our

marriage we kept the note in the dresser drawer; the last time

I saw it was in the dresser drawer. In the drawer I have

was any transaction between my wife and myself in which I have

had this note." He further testified that his son,

frequently paid him money; that "he paid the interest and then paid me some money on it besides. When I was short of money I asked him for a little money to help me out, for I never had to get any money any other way." This witness further testified that appellant had paid him in full for the principal and interest on said note, and in fact had paid him more than the total amount of the principal and accrued interest thereon.

Appellant testified in his own behalf that he had made payments to his father for principal and interest, the aggregate of which would more than cover the amount of the principal and accrued interest on said note. He further testified that he had no knowledge, prior to the time when he had completed the payments on said note and interest, that appellee had possession of said note or was claiming the same.

No indorsement or written assignment of said note was made to appellee by her husband. This is conceded by counsel for appellee.

It is first contended by appellant that, inasmuch as there was no indorsement of said note to appellee, she did not have the legal title thereto, and was not entitled to maintain a suit thereon in her own name. This point we think is well taken. Packer v. Roberts, 140 Ill. 67; Porter v. Cushman, 19 Ill. 572-574; Peck v. Bligh, 37 Ill. 317-330.

It is also contended by appellant that the finding that said note had been given to appellee by Henry T. Moulton, her husband, is against the manifest weight of the evidence. In this connection appellant insists that appellee was not a competent witness in her own behalf as to conversations between herself and her husband.

While appellee would be a competent witness to testify with reference to her possession of said note, and as to payments that may have been made by her husband to her thereon and the

...I was short of money I ... out, for I never had to ... This witness further testified ... paid him in full for the principal and ... and in fact had paid him more than the total ... of the principal and accrued interest thereon. ... his own behalf that he had made ... interest, the ... of the principal and ... He further testified that he ... prior to the time when he had completed the ... that appellee had possession ... or was called the same. ... of written assignment of said note ... by her husband. This is conceded by counsel ... for appellee. ... It is first contended by appellee that inasmuch as ... no indorsement of said note to appellee, she did not ... and was not entitled to maintain ... This point we think is well ... Robert v. Robert, 140 Ill. 67; Porter v. Guzman, 12 Ill. ... v. Ellis, 37 Ill. 317-320. ... It is also contended by appellee that the finding ... had been given to appellee by Henry T. Newton ... against the manifest weight of the evidence, ... this contention appellee insists that appellee was not a ... in her own behalf as to any questions between ... While appellee would be a competent witness to testify ... to her possession of said note, and as to payment ... have been made by her husband to her thereon and the

circumstances surrounding the same, she would not be entitled to testify to conversations, either with her husband or with any other person, out of the presence of appellant. Corder v. Corder, 124 Ill. 229-231; Francis v. Roades, 146 Ill. 635-640; Farlow v. Town of Camp Point, 186 Ill. 256-262. With the testimony of appellee as to such conversations eliminated, we are of the opinion and hold that the evidence is insufficient to show appellee to be the owner of said note.

Even though it should be held that appellee was a competent witness in her own behalf, yet under the authorities above cited, said note in her hands would be subject to the equitable defenses of appellant, as though said note were still owned by said indorsee. Porter v. Cushman, supra, 574; Peck v. Bligh, supra, 330; Bouton v. Cameron, 205 Ill. 50-68.

The evidence in this case clearly discloses that the payments made by appellant to his father, prior to any knowledge on the part of appellant that appellee ^{claim} ~~claimed~~ to own said note, were more than sufficient to pay the principal and accrued interest thereon. It might be further observed that, if appellant's theory of the case be taken as correct, she had constituted her husband as her agent to collect the principal and interest on said note. That being true, she would be bound by the acts of her agent, and if appellant had paid to appellee's husband and agent the full amount of the principal and interest on said note, appellee would be bound thereby, even though her husband may not have paid over to her the full amount thereof.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

circumstances and the same, she would not be entitled

to testify to a conversation, either with her husband or with any

other person, out of the presence of appellant. Gordon v. Gordon,

124 Ill. 230-231; Ward v. Rogers, 146 Ill. 632-640; Barlow v.

Town of Camp Lake, 161 Ill. 256-262. With the testimony of

appellant as to such conversations eliminated, we are of the

opinion and hold that the evidence is insufficient to show appellee

to be the owner of said note.

Even though it should be held that appellee was a

competent witness in her own behalf, yet under the authorities

above cited, said note in her hands would be subject to the

available defenses of appellant, as though said note were still

owned by said indorsee. Porter v. Quinman, supra, 574; Beck v.

Wright, supra, 530; Bouton v. Gensert, 205 Ill. 50-52.

The evidence in this case clearly discloses that the

payments made by appellant to his father, prior to any knowledge

on the part of appellant that appellee retained to own said note,

were more than sufficient to pay the principal and accrued inter-

est thereon. It might be further observed that, if appellant's

theory of the case be taken as correct, she had constituted her

husband as her agent to collect the principal and interest on

said note. That being true, she would be bound by the acts of

her agent, and if appellee had paid to appellant's husband

agent the full amount of the principal and interest on said note,

appellee would be bound thereby, even though her husband may not

have paid over to her the full amount thereof.

For the reasons above set forth, the judgment of the

trial court will be reversed and the cause will be remanded.

Reversed and remanded.

STATE OF ILLINOIS,

} ss.

SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

THE
APPELLATE COURT OF THE STATE OF NEW YORK
IN SENATE

1901

6075A
245 I.A. 639th

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

FRANKLIN H. BOGGS

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

APR 29 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

on. THOMAS M. JETT, Presiding Justice.

Hon. FORMAN J. JONES, Justice.

Hon. AUGUSTUS A. [REDACTED], Justice.

the opinion of the Court was filed in the
file of said Court, in the words and figures

7773

In The
APPELLATE COURT OF ILLINOIS,
Second District.

APRIL TERM, A. D. 1927.

MARIAN FREEMAN POWERS,)	
Appellee,	)	Appeal from the
-vs-	)	Peoria County
RAY A. POWERS,	)	Circuit Court
Appellant.)	

OPINION by BOGGS, J.

Appellee filed a bill in the circuit court of Peoria County on August 9, 1925, setting forth that she was married to appellant March 9, 1920; that one child was born as a result of said marriage, who at the time of the trial was about five years of age. Appellee charges in her bill that shortly after their marriage, appellant "has been guilty of extreme and repeated cruelty, and has beaten, struck, kicked and choked the complainant, has neglected to furnish her and his said child with food and clothing, and has used towards the complainant obscene and profane language;" setting forth specific instances of alleged cruelty in April, 1922, October, 1922, and May, 1926.

To said bill appellant filed an answer, denying each and every of said acts of cruelty, denying the use of profane language, etc. A trial was had before the chancellor, resulting in a finding and decree in favor of appellee, awarding to her

IN THE

APPELLATE COURT OF GEORGIA

Second District.

HON. HUGHES, J. PRESIDING.
HON. WOODWARD, J. REPORTING.
HON. WORMAN, J. JONES.

Appeal from the
Georgia County
Circuit Court

RAY A. FOWLER,
Appellant.
-vs-
MARIA FREDMAN FOWLER,
Appellee.

OPINION BY ROGERS, J.

Appellee filed a bill in the circuit court of Georgia County on August 9, 1925, setting forth that she was married to appellant March 9, 1920; that one child was born as a result of said marriage, who at the time of the trial was about five years of age. Appellee charges in her bill that shortly after their marriage, appellant "has been guilty of extreme and repeated cruelty, and has beaten, struck, kicked and choked the complainant, has neglected to furnish her and her child with food and clothing, and has used various and injurious means and profane language;" setting forth specific instances of alleged cruelty in April, 1922, October, 1922, and May, 1926.

To said bill appellant filed an answer, denying each

and every of said acts of cruelty, denying the use of profane language, etc. A trial was had before the commissioner, resulting in a finding and decree in favor of appellee, wherein he was

the custody of said child, alimony and solicitor's fees. To reverse said decree, this appeal is prosecuted.

Appellee at the time of the trial was 27 years of age and her husband was 31. Appellee testified that shortly after their marriage they went to live on a farm some nine miles from Joliet; that her husband was engaged in farming and stock-raising on a farm of 245 acres which belonged to appellant's father; that shortly after their marriage appellant was guilty of cruel and inhuman conduct toward her; that in May, 1920, he struck her in the face and bruised and blackened her eye; that in February, 1921, a quarrel arose over appellee having neglected to give appellant a fork at the dinner table, that he became angry and chased appellee "up two flights of stairs and struck me in the face and knocked me down the stairs." That in April, 1922, she had a quarrel with her husband; that he became angry and hit and struck her in the face and head with his clenched fist. That in October, 1922, they had a quarrel because her husband became angry when she gave him and his farm help only canned pork and beans for their supper, that "he hit and struck me and pulled a handful of hair out of my head." That she then left for her parents' home in Peoria; that appellant came to her parents' home in a few days and entreated her to return, and that she finally did so, and lived with appellant until May 8, 1926, when they had a quarrel in which her husband became angry and "grabbed me and hit me and struck me and grabbed me by the throat and tried to choke me, and told me to get out, he would be tickled to death to get rid of me." That she left in a day or so for her parents' home in Peoria, and has been living with them ever since.

the majority of said bills, although the majority is less. The
revenue said because, this report is presented.
Appellants at the time of the trial was 27 years of
age and her husband was 31. Appellants testified that shortly
after their marriage they went to live in a little town near
from which; that her husband was engaged in farming and
tending on a farm of 200 acres, which belonged to appellants.
Father; that shortly after their marriage appellants were going
of legal and financial matters; that in 1921, he
struck during the time and period and appellants was not; that
in February, 1921, a quarrel arose with appellants having occasioned
to give appellants a lot of the same bills, from the
every and caused appellants to be afraid of them and
he in the face and caused her to be afraid. That in April,
1922, she had a quarrel with her husband; that on August
and hit and struck her in the face and head with his clenched
fist. That in October, 1922, they had a quarrel because her
husband told her that she gave him and his farm help only
around five and beans for their supper, that "he hit and struck
me and filled a handful of hair out of my head." That she then
left the premises, home in Florida; that appellants came to
her parents' home in a few days and entreated her to return, and
that she finally did so, and lived with appellants until May 8,
1923, when they had a quarrel in which her husband became angry
and "grabbed me and hit me and struck me and crowded me by the
throat and tried to choke me, and told me to get out, he would
be forced to death to get rid of me." That she left in a day
or so for her father's home in Florida, and has been living with
him since then.

She further testified that in October, 1922, after she had returned to Peoria, that appellant came and wanted her to return to their home, and that her father said to appellant: "My daughter has told me of the way you have treated her. My daughter told me about a few months after your marriage, that you struck her and blackened her eye, and that you knocked her down the stairs and that you struck and hit her in the head, and that you choked her and hit her on the head and shoulders," and that appellant admitted he had done it and said: "I am sorry, if you will only give me another trial and let her go home with me I will see that it doesn't happen again." She further testified that appellant went home and then came back in a few days with his mother, and that "they fell on their knees and pleaded and begged me to forgive him and give him another trial, and I finally agreed that I would, and after a few days I returned to my husband's home." She further testified that from that time until May, 1926, he never struck her, but that he used vile language toward her at numerous times.

Appellee's father corroborated her with reference to what appellant had said to him and what he said to appellant, following appellee's return to her parents' home in October, 1922. Mrs. Freeman, the mother of appellee, testified that her husband had recounted to appellant the accusations made by his wife, and that appellant acknowledged that he had been guilty of those acts and begged appellee to return and live with him, and that he would do better.

Two letters written by appellant to appellee in October, 1922, while she was at her parents' home, were offered in evidence. In those letters appellant admitted that he had not used appellee as he should, and said that he would try to do better and make

things easier for her. In the first of said letters he used this, among other language: "As for me striking you, there is no excuse in the world for it, and I feel like a beast and all dad Freeman called me when I think of it. In the accusations you make against me, be perfectly honest, for I think you have exaggerated. You know that I never more than slapped you at any time, and you have your parents believing that I beat you good. How many times have you slapped my face and pulled my hair?" Both of these letters disclose that appellant was very desirous of having appellee return to him, and evidence a strong affection for her and their child.

Appellant testified on his own behalf, and in each and every instance specifically denied having at any time struck, beaten or choked appellee, with the exception that in October, 1922, he testified:

"I came into the house for supper and my wife just handed me out a cold lunch. *** Well, it started into a quarrel, and on this occasion I did strike my wife when she was slapping at me, and she grabbed my hair before ever I touched her. That was the only occasion of our quarrel which I admitted to her parents, and I felt ashamed and I humbled myself and went down and asked for forgiveness, and have had this to face ever since." He further denied ever having knocked his wife down the stairs.

Appellee testified that no marks were left on her person on any of these occasions, except the one in April, 1920, shortly after their marriage, when she said that appellant blackened her eye. She testified that she showed the condition of her eye to appellant's father. Appellant's father specifically denied that appellee had ever said anything to him about appellant having struck her, or that her eye was blackened. She also

things easier for her. In the first of said letters he said:
"This, among other things: 'As for me sitting you, there is
no exercise in the world for it, and I feel like a beast and all
the fishermen called me when I think of it. In the meantime
you make excise me, be perfectly honest, for I think you have
exaggerated. You know that I never more than slapped you at
any time, and you have your parents believing that I beat you
good. How many times have you slapped my face and pulled my
hair?' Note of these letters disclose that appellant was very
distinct of having applied return to him, and evidence a
strong affection for her and their child."

Appellant testified on his own behalf, and in each
and every instance specifically denied having at any time struck,
beaten or abused appellee, with the exception that in October,
1932, he testified:

"I came into the house for supper and my wife just
handed me out a cold lunch. 'Well, it started into a quarrel,
and on this occasion I did strike my wife when she was slapping
at me, and she grabbed my hair before even I touched her. That
was the only occasion of our quarrel which I admitted to her
parents, and I felt ashamed and I humbled myself and went down
and asked for forgiveness, and have had this to this ever since."
He further denied ever having knocked his wife down the stairs.

Appellee testified that no marks were left on her
person from any of these occasions, except the one in April, 1930,
shortly after their marriage, when she said that appellant black-
ened her eye. She testified that she showed the condition of her
eye to appellant's father. Appellant's father specifically denied
that appellee had ever said anything to him about appellant
having struck her, or that her eye was blackened. She also

testified that on one of these occasions when she charged appellant struck her, that a man by the name of Wolter was working for them and was a witness to said transaction. Wolter went on the stand and testified that he never saw appellant strike his wife during the time he was at their farm.

Several of the former neighbors of appellee and her husband when they lived near Joliet testified on ^e behalf of appellant that they never saw appellant mistreat appellee; that they were in their home and that the home was well furnished and appellee and her baby were well and comfortably clothed. A Mrs. Hughes testified that she lived near appellee and appellant in the spring of 1924; that she saw appellee frequently; that "for a great deal of the time we met Wednesdays and Saturday evenings in the village grocery store. I visited in her home numerous times; she visited in my home. *** Outside my housework, I do child welfare work. *** In October, last fall, at my home in Mokena, I talked to the complainant. She came to me and said she wanted a divorce. When the matter of divorce was mentioned I said: 'I don't know what grounds you have. I don't think you have any grounds.' I says, 'You are supported, you are clothed, you have a home.'** I observed the conduct of the defendant towards the child many times. He was very affectionate."

Appellee testified that from October, 1922, to May, 1926, appellant never struck her, though she says he used vile language toward her. There is also evidence in the record, given by the witness Wolter as well as by appellant, that appellee when angry was also given to using profane language. Neither in October, 1922, nor in May, 1926, does either the father or mother of appellee testify to having seen any marks on her person, although appellee testified that she went directly to Peoria from her home on the farm near Joliet.

testified that one of these persons was the appellant and that
appellant had been by the name of Walter was working for them
and was a witness to said transaction. Appellant was in the store
and testified that he never saw appellant again after that time
the time he was at their home.

Several of the former neighbors of appellant and her

husband were also lived near appellant testified on behalf of
appellant that they never saw appellant at appellant's home;
they were in their home and that the home was well known and
appellant and her family were well known to appellant's family. A few
neighbors testified that they lived near appellant and appellant in
the spring of 1932; that they saw appellant frequently; that for
a great deal of the time they met appellant and appellant's family
in the village grocery store. I visited in her home numerous

times; she visited in my home. *** Outside my housework, I do

call Walter's work. *** In October, last fall, at my home in

Wadena, I talked to the appellant. She came to me and said

she wanted a divorce. When the matter of divorce was mentioned

I said: "I don't know what you are saying. I don't know you

have any children." I said, "You are married. You are married,

you have a home." *** I observed the conduct of the appellant

towards the child many times. He was very affectionate."

Appellant testified that from October, 1932, to May,

1933, appellant never struck her, though she says he used wife

language toward her. There is also evidence in the record, given

by the witness Walter as well as by appellant, that appellant when

any was also given to using profane language. Whether in

October, 1932, or in May, 1933, does either the father or mother

of appellant testify to having seen any marks on her person, or

that appellant testified that she was distressed by appellant's

her home on the time was called.

Without going into a more detailed discussion of this evidence, we are of the opinion and hold that there is no sufficient showing made by appellee in this record to warrant a decree awarding her a divorce against appellant for extreme and repeated cruelty.

In Abbot v. Abbot, 192 Ill. 439, the supreme court at page 444 says:

"It is very clear from all the evidence in this record that these people to a certain extent lived unhappily together; but it is the policy of our statute, and the good of society demands, that divorces shall not be granted from any sentimental considerations. The duty of these parents to their children and to society demands that they should not be divorced, except for statutory reasons."

In Trenchard v. Trenchard, 245 Ill. 313, the court at page 315 says:

"What is meant by cruelty as used in our statute has been the subject of consideration by this court in many cases, and has been construed to mean physical acts of violence; bodily harm such as endangers life or limb; such acts as raise a reasonable apprehension of bodily harm and of a state of personal danger incompatible with the marriage state. Bad temper, petulance of manner, rude language, want of civil attentions, or angry or abusive words, are not sufficient grounds for a divorce for extreme and repeated cruelty." Citing Henderson v. Henderson, 88 Ill. 248; Harman v. Harman, 16 Ill. 85; Embree v. Embree, 53 Ill. 394; Maddox v. Maddox, 189 Ill. 152; Fizette v. Fizette, 146 Ill. 328.

The evidence discloses that appellant comes of a good family, and that he is an industrious, hard working man. While it is probable that he is quick-tempered, the evidence also dis-

Without going into a more detailed discussion of this evidence, we are of the opinion and hold that there is no sufficient showing made by appellee in this record to warrant a divorce against her a divorce against appellant for extreme and repeated cruelty.

In Abbott v. Abbott, 192 Ill. 457, the supreme court

at page 444 says: "It is very clear from all the evidence in this record that these people to a certain extent lived unhappily together, but it is the policy of our statute, and the good of society demands, that divorce shall not be granted from any sentimental considerations. The duty of these parents to their children and to society demands that they should not be divorced, except for statutory reasons."

In Thompson v. Thompson, 245 Ill. 313, the court

at page 315 says: "What is meant by cruelty as used in our statute has been the subject of consideration by this court in many cases, and has been construed to mean physical acts of violence; bodily harm such as endangering life or limb; such acts as raise a reasonable apprehension of bodily harm and of a state of personal danger incompatible with the marriage state. Bad temper, petulance of manner, rude language, want of civil attentions, or any or all of these, and the like, are not sufficient to constitute cruelty for extreme and repeated cruelty." Citing Harmon v. Harmon, 16 Ill. 88; Emree v. Emree, 83 Ill. 326; Harmon v. Harmon, 16 Ill. 88; Emree v. Emree, 83 Ill. 326; Widow v. Widow, 189 Ill. 138; Widow v. Widow, 189 Ill. 138.

146 Ill. 323. The evidence disclosed that appellant comes of a good family, and that he is an industrious, hard working man. While it is probable that he is a bit of a dandy, the evidence also

closes that appellee is quick tempered. That is not sufficient ground on which to award a decree of divorce.

We are so thoroughly convinced by the reading of this record, that appellant is desirous to maintain his home and to have his wife and daughter with him, and that he is willing to care for and support them according to his ability, that we are of the opinion and hold that this decree should be reversed and the cause remanded, with directions to dismiss appellee's bill for want of equity.

Reversed and remanded,
with directions.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty _____

Clerk of the Appellate Court

6096a

2451.A. 639 #4

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

FRANKLIN H. BOGGS

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 29 1927 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

AT A TERM OF THE APPELLATE COURT.

at Ottawa, on Tuesday, the fifth day of April, in

for the Second District of the State of Illinois;

THOMAS M. JETT, Presiding Justice.

WMAN L. JONES, Justice.

Justice.

U. S. CLARK, Sheriff.

that afterwards, to-wit: On

in the words and figures

Term No. 57.

7776

Agenda No. 45.

In The
APPELLATE COURT OF ILLINOIS,
Second District.

APRIL TERM, A. D. 1927.

THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant in Error,

-vs-

GERHART GORDON,
Plaintiff in Error.

)
)
) Error
) to the
) McHenry County
) Circuit Court
)
)
)
)
)
)

OPINION by BOGGS, J.

Plaintiff in error was indicted and tried in the circuit court of McHenry County on an indictment consisting of three counts: the first count charging an unlawful possession of intoxicating liquor; the second, an unlawful possession with intent to violate the prohibition law, and the third, an unlawful sale of intoxicating liquors, contrary to the provisions of the Illinois Prohibition Law. The jury returned a verdict of guilty on all three counts, and the motion for new trial made by plaintiff in error having been overruled, the court entered judgment on the verdict. Plaintiff in error was fined in the aggregate \$1,000, and costs, and was sentenced to the county jail of said county for a term of 120 days. To reverse said judgment, this writ of error is prosecuted.

No complaint is made by counsel for plaintiff in error

1777

In The

ALLEGEDLY OF THE STATE

Second Defendant.

ALLEGEDLY OF THE STATE

Error
to the
McHenry County
Circuit Court

THE PEOPLE OF THE STATE
ON PETITION
Defendant in Error.

-vs-

GEORGE G. GORDON,
Plaintiff in Error.

GRANT BY COURT, 11

Plaintiff in error was indicted and tried in the circuit court of McHenry County on an indictment consisting of three counts: the first count charging an unlawful possession of intoxicating liquor; the second, an unlawful possession with intent to violate the prohibition law, and the third, an unlawful sale of intoxicating liquor, contrary to the provisions of the Illinois Prohibition Law. The jury returned a verdict of guilty on all three counts, and the motion for new trial made by Plaintiff in error having been overruled, the court entered judgment on the verdict. Plaintiff in error was fined in the aggregate \$1,000, and costs, and was sentenced to the county jail of said county for a term of 180 days. To reverse said judgment, this writ of error is prosecuted.

No complaint is made by counsel for Plaintiff in error

as to the sufficiency of the indictment, or as to the rulings of the court on the instructions. Neither the indictment nor any of the instructions are set out in the abstract.

A large part of the argument of counsel for plaintiff in error is based on his contention that the court, on the cross examination of plaintiff in error, allowed the state's attorney to cross examine him with reference to immaterial and irrelevant matters, and that it tended to prejudice the jury against plaintiff in error; and also that certain of the remarks of the assistant state's attorney in his argument to the jury at the close of the case were unwarranted and of a prejudicial character.

We have searched the abstract in connection with counsel's contention in this respect, but fail to find any objection to the cross examination of plaintiff in error, or any objection or exception to the statements of either the state's attorney or the assistant state's attorney, made in the presence of the jury, either in the argument or at any other time on the trial of said cause. If counsel desire to assign error on the examination or cross examination of a witness, the matter must be brought to the attention of the trial court, and a ruling obtained thereon. The same applies to the remarks of counsel. In order to bring the remarks of counsel, made on the trial of a cause, to the attention of a reviewing court, such remarks must be excepted to, and a ruling obtained thereon. That was not done in this case, and the assignment of error thereon cannot be considered by us. Earll v. People, 99 Ill. 123-136; Leipser v. People, 227 Ill. 364-373; People v. Weil, 243 Ill. 208-214; People v. Ellsworth, 261 Ill. 275-278.

It is also urged as a ground for reversal in this case, that, upon an intoxicated person having appeared in the

as to the sufficiency of the indictment, or as to the rulings of the court on the instructions. Neither the indictment nor any of the instructions are set out in the abstract. A large part of the argument of counsel for plaintiff

in error is based on his contention that the court, on the cross examination of plaintiff in error, allowed the state's attorney to cross examine him with reference to immaterial and irrelevant matters, and that it tended to prejudice the jury against plaintiff in error; and also that certain of the remarks of the assistant state's attorney in his argument to the jury at the close of the case were unwarranted and of a prejudicial character.

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lobby adjoining the courtroom during the trial of said cause, attention was directed thereto by counsel for the State in such a way as to prejudice plaintiff in error's case. We have examined the record in this connection, and hold that plaintiff in error is not in a position to urge this assignment of error, as counsel for plaintiff in error took part in the discussion that occurred at the time. The evidence as to said occurrence is as follows:

"Mr. McCauley: Mr. Holtz is out here in the lobby causing a disturbance, intoxicated, a man who was let out of jail yesterday. I would like to have a bench warrant for him.

"THE COURT: Let the Sheriff go take him now.

"Mr. Lumley: On what? If he is drunk swear out a warrant and prosecute him for disturbing the peace.

"THE COURT: Is he drunk? Take him and lock him up. Take him out of here."

It is further strenuously urged that on the record in this case, the evidence is not sufficient to support the verdict.

On behalf of the People, one Oliver Gleason testified that he was employed by the state's attorney of said county as an investigator, and was directed to ascertain if he could purchase intoxicating liquor from plaintiff in error; that upon receiving said employment he went to Harvard (in said county), in company with a Mr. Francis; that he had been directed,, when he arrived at Harvard, to call on a man by the name of Joe Evans, which he did, and that he, with Evans, went to plaintiff in error's; that he told plaintiff in error "I wanted to buy a quart, and Joe Evans said it would be all right. Mr. Gordon then left the house, went out the back door, and came back with two pint bottles of liquor. The appearance of the liquor was

lobby adjoining the courtroom during the trial of said cause, attention was directed thereto by counsel for the State in such a way as to prejudice plaintiff in error's case. We have examined the record in this connection, and hold that plaintiff in error is not in a position to urge this assignment of error, as counsel for plaintiff in error took part in the discussion that occurred at the time. The evidence as to said occurrence is as follows:

"MR. McALLISTER: Mr. Holt is out here in the lobby causing a disturbance, intoxicated, a man who was let out of jail yesterday. I would like to have a bench warrant for him."

"THE COURT: Let the Sheriff go take him now."

"MR. MUMFORD: On what? If he is drunk swear out a warrant and prosecute him for disturbing the peace."

"THE COURT: Is he drunk? Take him and lock him up. Take him out of here."

It is further strenuously urged that on the record in this case, the evidence is not sufficient to support the verdict.

On behalf of the People, one Oliver Gleason testified that he was employed by the state's attorney of said county as an investigator, and was directed to ascertain if he could purchase intoxicating liquor from plaintiff in error; that upon receiving said employment he went to Harvard (in said county), in company with a Mr. Francis; that he had been directed when he arrived at Harvard, to call on a man by the name of Joe Evans, which he did, and that he, with Evans, went to plaintiff in error; that he told plaintiff in error "I wanted to buy a quart, and Joe Evans said it would be all right. Mr. Gordon then left the house, went out the back door, and came back with two pint bottles of liquor. The appearance of the liquor was

colorless. It was in pint bottles. We paid \$4 for the two bottles." He further testified that he and Joe Evans got in the car with Francis and went with the liquor to the grand jury room; that he drank from one of these bottles, and that the liquor was intoxicating.

Charles Francis went on the stand and testified that he was an attorney living in Woodstock; that he went with Gleason to Harvard, but did not go with him to call on plaintiff in error.

The possession of the bottles, from the time they were turned over by Gleason in the grand jury room, to the time of said trial, was accounted for by the State's witnesses, and no question is made by counsel for plaintiff in error in his argument on this point. The state's attorney caused the contents of said bottles to be analyzed by a chemist, who testified that his analysis showed 49.45% alcohol by volume.

Plaintiff in error on his own behalf testified that he was a farmer, in the occupation of about sixty acres of land which he rented from month to month; that he did not know Oliver Gleason or Joe Evans; that he never sold Gleason any liquor on May 24th, 1926, or on any other day; that he was in Beloit on May 24th, and did not leave there until about three o'clock or a little after, and that he got home about four o'clock; that no one was there and that the house was locked when he got home. On cross examination, plaintiff in error testified as follows:

"Q. You can't remember that day, but you can remember those other days you were in Chicago and Beloit?

"A. I don't know just ~~what~~ day I was in Beloit.

"Q. You don't know what day you were in Beloit?

"A. Yes.

"Q. What was the answer?

colours. It was in pink bottles. He said it for the two bottles. He further testified that he and Joe Evans got in the car with Evans and went with the liquor to the front room; that he drank from one of these bottles and that the liquor was intoxicating. When he says that Evans testified Evans was on the stand and testified that he was an attorney living in Beloit, that he went with Evans to Evans, but did not go with him to call in Beloit in error. The possession of the bottles, from the time they were turned over by Evans to the time they were in the hands of said trial, was accounted for by the State's witnesses, and no question is made by counsel for Plaintiff in error in this regard on this point. The state's attorney caused the contents of said bottles to be analyzed by a chemist, who testified that his analysis showed 49.45% alcohol by volume.

Plaintiff in error on his own behalf testified that he was a farmer, in the occupation of about sixty acres of land which he rented from month to month; that he did not know Oliver Glasgow or Joe Evans; that he never sold Glasgow any liquor on May 24th, 1936, or on any other day; that he was in Beloit on May 24th, and did not leave there until about three o'clock on a little after, and that he got home about four o'clock; that no one was there and that the house was locked when he got home. On cross examination Plaintiff in error testified as follows:

Q. You don't remember that day, May 24th, and you don't remember that day, May 25th, and you were in Beloit and Beloit. A. I don't know just which day I was in Beloit. Q. You don't know what day you were in Beloit? A. Yes, I do. Q. What was the answer?

"Answer read by reporter: 'I don't know just what day I was in Beloit.'"

"Q. Do you mean that, or did that just slip out?

"A. I answered that once or twice."

Robert Orr, a witness on behalf of plaintiff in error, testified that he was in plaintiff in error's employ in the month of May, 1926; that he left plaintiff in error's place on the 24th day of May, about nine o'clock in the morning in his Ford sedan for Harvard, and that plaintiff in error passed him on the road.

From an examination of the record in this case as above set forth, it will be observed that on the part of the People, Gleason specifically testified to having purchased two pints of intoxicating liquor from plaintiff in error. On the part of plaintiff in error, he denies this. We are therefore of the opinion and hold that the question of the sufficiency of the evidence to warrant the verdict was for the jury, and we would not be warranted in reversing the judgment on the ground that the evidence was not sufficient to support the verdict. People v. True, 314 Ill. 89-93, citing: People v. Grosenheider, 266 Ill. 324; People v. McCann, 247 Ill. 130; People v. Fisher, 303 Ill. 594; People v. Hildebrand, 307 Ill. 544; People v. McGuirk, 312 Ill. 257.

On the matter of plaintiff in error's alleged alibi, it was for him to produce evidence in support thereof which, when taken in connection with all the other evidence in the case, was sufficient to raise a reasonable doubt as to his guilt on the whole evidence. Carlton v. People, 150 Ill. 181; Hauser v. People, 210 Ill. 153; People v. Lukoszus, 242 Ill. 101; People v. Collins, 253 Ill. 266; People v. Jennings, 298 Ill. 286. The jury having found against plaintiff in error on this issue, we are not prepared to say that they were not warranted in so doing.

"Answer read by reporter: 'I don't know just what

day I was in Beloit."

"Q. Do you mean that, or did that just slip out?

"A. I answered that once or twice."

Robert Orr, a witness on behalf of plaintiff in error,

testified that he was in plaintiff in error's employ in the month of May, 1926; that he left plaintiff in error's place on the 24th day of May, about nine o'clock in the morning in his Ford sedan car, and that plaintiff in error passed him on the road.

From an examination of the record in this case it appears that, it will be observed that on the part of the People, Gleason specifically testified to having purchased two plates of intoxicating liquor from plaintiff in error. On the part of plaintiff in error, he denies this. We are therefore of the opinion and hold that the question of the sufficiency of the evidence to warrant the verdict was for the jury, and we would not be warranted in reversing the judgment on the ground that the evidence was not sufficient to support the verdict.

People v. True, 214 Ill. 89-92, citing: People v. Grossenheider, 222 Ill. 324; People v. McGinnis, 247 Ill. 250; People v. Fisher, 263 Ill. 524; People v. Hildebrand, 307 Ill. 544; People v. ..., 312 Ill. 257.

On the matter of plaintiff in error's alleged slip, it was for him to produce evidence in support thereof, which, when taken in connection with all the other evidence in the case, was sufficient to raise a reasonable doubt as to his guilt on the whole evidence. Garmon v. People, 180 Ill. 181; Hanser v. People, 210 Ill. 153; People v. Imposane, 242 Ill. 101; People v. Collins, 253 Ill. 266; People v. Jennings, 298 Ill. 266. The jury having found against plaintiff in error on this issue, we are not prepared to say that they were not warranted in so

An affidavit appears in the abstract, made by V. S. Lumley, counsel for plaintiff in error, to the effect that on the morning following the return of the verdict of the jury, "he talked with several of the jurors, and in said conversation said jurors stated to this affiant that there was no evidence to convict the defendant of the charge alleged in the indictment, but that they knew him personally, that he was not a naturalized citizen and that they knew him personally better than affiant did; that they convicted him on general principles, without any regard to the evidence produced on the trial; that they would like to see him run out of the community where he lives."

This affidavit, if of a character to be considered by the court, could not be so considered, for the reason that it is not made a part of the bill of exceptions. Motions, affidavits and matters of that character, in order to be made a part of the record so as to be considered by a reviewing court, must be incorporated in and made a part of the bill of exceptions. People v. Tielke, 259 Ill. 88-98; People v. Ellsworth, supra, 278; People, ex rel Shriver v. Cowen, 283 Ill. 308-312.

Aside from the fact that said affidavit is not properly a part of the record, we are of the opinion and hold that ex parte affidavits of this character are not proper and are not to be given consideration, either by the trial court or by a reviewing court. Hughes v. People, 116 Ill. 330.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

an affidavit appears in the abstract, made by V. B. ...
... in error, to the effect that on ...
... the return of the verdict of the jury ...
... several of the jurors, and in said conversation ...
... said affidavit stated to this effect that there was no evidence ...
... of the charges alleged in the indictment ...
... that he was not a naturalized ...
... that they knew him personally better than said ...
... convicted him on general principles, without any ...
... on the trial; that they would ...
... the community where he lives." ...
... if of a character to be considered ...
... for the reason that it ...
... of exceptions. ...
... in order to be made a part of ...
... by a reviewing court, must be ...
... of the bill of exceptions. ...
... People v. ... 88-98; People v. ...
...
... that said affidavit is not ...
... of the record, we are of the opinion and hold ...
... of this character are not proper and ...
... given consideration, either by the trial court or ...
... People v. ... 115 Ill. 330. ...
... Finding no reversible error in the record, the judgment ...
... of the trial court will be affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS I. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

6077a

AT A TERM OF THE APPELLATE COURT,

7977
2451A. 639 #5

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 29 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

7779

In The
APPELLATE COURT OF ILLINOIS,
Second District.

APRIL TERM, A. D. 1927.

LENA MAY CLARK,)	
Appellee,	)	Appeal from the
-vs-	)	Stark County
JOHN CLARK,	)	Circuit Court
Appellant.)	

OPINION by BOGGS, J.

Appellee filed a bill in the circuit court of Stark County, alleging that she was intermarried with appellee^{ant} on December 24th, 1912, and that as the result of said marriage two children were born, Robert, aged eleven, and Forrest aged nine. The bill as finally amended charges that appellant "had kicked, choked and beat complainant, and particularly on or about June 5th, 1924, he choked and ill-treated her; that in August, 1924, the defendant threatened to kill complainant, that his threat to kill was made in anger; and his wife feared he would carry such threat into execution."

To said bill appellant filed an answer, specifically denying that he ever kicked, ~~choked~~, beat or threatened appellee, in August, 1924, or at any other time. On the trial before the chancellor, a finding was made in favor of appellee and a decree of divorce was granted, awarding appellee the custody of said

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IN THE
SUPREME COURT OF ILLINOIS,
Second District.

APRIL TERM, A. D. 1927.

Appeal from the
Circuit Court
Stark County

LENA MAY CLARK,
Appellee,
-vs-
JOHN CLARK,
Appellant.

OPINION BY BOGGS, J.

Appellee filed a bill in the circuit court of Stark County, Illinois, alleging that she was intimidated and coerced by appellant and that as the result of said coercion and threats she was forced to leave her home and to flee to the State of Illinois. The bill as finally amended charges that appellant threatened and beat complainant, and particularly on or about June 24th, 1912, and that as the result of said threats and coercion children were born, Robert, and others, and further that she was forced to leave her home and to flee to the State of Illinois. The bill as finally amended charges that appellant threatened to kill complainant, and particularly on or about June 24th, 1912, he choked and ill-treated her; that in August, 1924, the defendant threatened to kill complainant, that his threat to kill was made in anger; and his wife feared he would carry out threat into execution.

To said bill appellant filed an answer, specifically denying that he ever kicked, choked, beat or threatened appellee, in August, 1924, or at any other time. On the trial before the Chancellor, a finding was made in favor of appellee and a decree of divorce was granted, annulling appellee's marriage of said

children with the right of visitation on the part of appellant, and ordering appellant to pay appellee \$20.00 per month for the care and support of said children. To reverse said decree, this appeal is prosecuted.

The record discloses that appellant was a farm laborer, working by the month and earning from \$450 to \$500 per year; that appellee was in charge of the telephone exchange in the village of Castleton, and had been there for some while prior to the rendition of said decree; that the residence of said parties for some time prior to the filing of said bill was in the same building as said exchange.

Quoting from the record, appellee testified that one morning "he (appellant) became angry at me when I was getting breakfast, and came up and choked me." She further testified that she got away from him and went back in the office; that she hadn't done anything to cause appellant to choke her, and that the trouble came up over an argument about the boys. She also testified as follows:

"Q. What happened in August, 1924?

"A. That was when he said he would kill me.

"Q. What did he say?

"A. He said he would kill me.

"Q. What time of day was that?

"A. That was in the morning, between 4:30 and 5 o'clock."

She testified that she and her husband were in bed at that time and that the children were upstairs; that her son Robert came down and that "after he (appellant) made this threat, he went out to work."

While appellee on her direct examination did not in any way specify as to whether or not the choking in question injured her or left any marks on her person, on cross examination

counse

children with the right of visitation on the part of appellant, and ordering appellant to pay \$100.00 per month for the care and support of said children. In several other respects, the appeal is successful.

The record discloses that appellant was a farm laborer, working by the month and earning from \$450 to \$500 per year. That appellee was in charge of the telephone exchange in the village of Gastleton, and had been there for some while prior to the residence of said decree; that the residence of said parties for some time prior to the filing of said bill was in the same building as said exchange.

Quoting from the record, appellee testified that one morning "he (appellant) became angry at me when I was getting breakfast, and came up and choked me." She further testified that she got away from him and went to the office, and that she didn't do anything to cause appellant to choke her, and that the trouble came up over an argument about the boys. She also

testified as follows:

"Q. What happened in August, 1934?
"A. That was when he said he would kill me.
"Q. What did he say?
"A. He said he would kill me.
"Q. What time of day was that?
"A. That was in the morning, between 4:30 and 5 o'clock."

She testified that she and her son Robert came out and the children were upstairs; that her son Robert came down and that "after he (appellant) made this threat, he went to work."

While appellee on her direct examination did not in any way testify as to whether or not the choking in question was done by appellant or by any other person, on cross examination

counsel for appellant brought out that the choking did hurt her, and that finger prints were left on her neck.

The son Robert testified that early one morning in August, 1924, he heard his father and mother quarreling; that he came down the stairs and heard his father say: "Threshing is nearly over, I will end it all," and as he went out the door he said, "God damn you, I will kill you;" that his father then went out to the barn. On cross examination, the Court asked this witness the following:

"Q. Have you ever heard him (appellant) abuse your mother at any time only that (referring to the occasion in August, 1924)?

"A. No.

"Q. Have you ever heard him swear at her?

"A. No, sir.

"Q. You never heard him mistreat her but that once?

"A. That once."

This witness further testified that his father had always been good to him, and had been good to him up to the time of the trial.

Appellant testified in his own behalf that he had never struck, choked or in any way done physical violence to his wife, and that he had never at any time threatened her life. He further testified that the chief cause of their trouble had been that within the last year or so prior to their separation, appellee, against the request of appellant, had gone to dances with her cousin, one Clark Leedy, and that since their separation she had been going to dances with one Jim Atkinson.

Appellee on cross examination admitted having gone to dances with her cousin Leedy, and had also been going with Atkinson, and that this was over the objections of her husband. She testified that one night she had been to a dance with Leedy and did not get home until about one o'clock, and another night

...and that ...
The son Robert testified that early one morning in ...
...he heard his father and mother quarrelling; that he ...
...came from the stairs and heard his father say: "Threshing is ...
...nearly over, I will end it all," and as he went out the door he ...
...said, "God damn you, I will kill you," that his father then went ...
...out to the barn. ... the Court asked this witness the following ...
Q. Have you ever heard him (appellant) swear your ...
...at any time only that (referring to the occasion in August, ...
...1924? ...
A. No. ...
Q. Have you ever heard him swear at her? ...
A. No, sir. ...
Q. You never heard him mistreat her but that once? ...
A. That once. ...
This witness further testified that his father had always been ...
...good to him, and had been good to him up to the time of the trial. ...
Appellant testified in his own behalf that he had never ...
...struck, choked or in any way used physical violence to his wife ...
...and that he had never at any time threatened her life. He further ...
...testified that the chief cause of their trouble had been that ...
...within the last year or so prior to their separation, appellee ...
...and at the request of appellant, had gone to dances with her ...
...with one Clark Leedy, and that since their separation she had ...
...been going to dances with one Jim Atkinson. ...
Appellee on cross examination admitted having gone to ...
...dances with her cousin Leedy, and had also been going with ...
...and that this was over the objections of her husband. ...
...the testified that she also had been to a dance with Leedy ...
...and did not get home until about one o'clock, and another night

she had been out with Atkinson to a dance and did not get home until nearly two in the morning; that on the night she was out with Atkinson, her husband was at the home when they arrived, and that when Atkinson got out, her husband fired some shots, but told appellee that he had no intention of injuring her. Appellant testified in this connection that he fired the shots into the air, and that he had no intention of in any way injuring his wife. Appellee also testified on cross examination that her husband never had pointed a gun at her, and never had a gun in his hands at any time when she claims he threatened her.

Appellant also testified that, subsequent to their separation in March, 1925, he stayed at his home one night, and that appellee occupied the bed with him.

In corroboration of this statement, one Lola Gates, a witness on behalf of appellant, testified that she worked at the exchange for appellee in March and April, 1925; that "John (appellant) stayed there one night about April 1st, 1925; Mrs. Clark said they slept together." She further testified: "One day she (appellee) said she would like to get a divorce, but she had no grounds."

Appellee went on the stand and denied having occupied the same bed with appellant after their separation. Robert also testified that his father had not stayed all night with his mother after the separation. However, his testimony was to the effect that he did not occupy the same room with his mother, and his conclusion that his father did not stay there was based on the fact that he went to bed at the same time his mother did.

This, in substance, is the testimony in the case. It is seriously contended by counsel for appellant that the finding and decree of the court is against the manifest weight of the evidence.

she had been out with Winston to a dance and did not get home until about two in the morning; that on the night she was out with Winston, her husband was at the home when they arrived, and that when Winston got out, her husband fired some shots, but that appellee was not in the room and had no intention of injuring her.

Appellant testified in this connection that he fired the shots into the air, and that he had no intention of in any way injuring Mrs. White. Appellee also testified on cross examination that her husband never had pointed a gun at her, and never had a gun in his hands at any time when she claims he threatened her.

Appellant also testified that, subsequent to their conversation in March, 1935, he stayed at his home one night, and that appellee occupied the bed with him.

In corroboration of this statement, one Lois Gates, a witness on behalf of appellant, testified that she worked at the garage for appellee in March and April, 1935; that "John" (appellant) stayed there one night about April 1st, 1935; that "John" and "Mary" (appellee) were together. She further testified: "One day she (appellee) said she would like to get a divorce, but she had no grounds."

Appellee was on the stand and testified that she and appellant had been married for several years, and that they had two children, a son and a daughter. She testified that she and appellant had been separated for some time, and that she had been living with her mother and father for some time. She testified that she had been living with her mother and father for some time, and that she had been living with her mother and father for some time.

However, his testimony was to the effect that he did not occupy the same room with his mother, and his conclusion that his father did not stay there was based on the fact that he went to bed at the same time his mother did.

This, in substance, is the testimony in the case. It is obviously contradicted by counsel for appellee that the finding of the court is against the appellant on the weight of the evidence.

The only act of cruelty testified to by appellee is the one occasion when she testified that appellant choked her. The question therefore arises on this record as to whether, taking the testimony of appellee and her witnesses as true, the court was authorized under the statute in granting appellee a decree of divorce.

The authorities in this state are all to the effect that a decree of divorce can only be granted upon one or more of the grounds set forth in the statute. Henderson v. Henderson, 88 Ill. 248-250; Maddox v. Maddox, 189 Ill. 152-154; Trenchard v. Trenchard, 245 Ill. 313. In the latter case, the court at page 315 says: "The dissolution of the marriage relation is a grave matter and can only be justified where the case is strictly within the statute. Our statute is sufficiently liberal in enumerating the causes for which a divorce may be granted, and it has always been the policy of this court that parties seeking a divorce should bring themselves within the statute."

The ground relied on in this case is extreme and repeated cruelty. Our courts have specifically held in numerous decisions that one act is not sufficient to constitute extreme and repeated cruelty. Vignos v. Vignos, 15 Ill. 186-187; Turbitt v. Turbitt, 21 Ill. 438-439; Embree v. Embree, 53 Ill. 394-395; Henderson v. Henderson, 88 Ill. 248-250; Fizette v. Fizette, 146 Ill. 328-336; Maddox v. Maddox, 189 Ill. 152-153.

Our courts have also held that words, in and of themselves, no matter how harsh their character may be, do not constitute cruelty. Embree v. Embree, supra, 395, where it is said:

"It is a positive requirement of the statute, that there shall be extreme and repeated cruelty, to authorize the courts to dissolve the marriage tie. One act has not, in this State, been held to answer the requirements of the statute.

The only act of cruelty testified to by appellee is the one occasion when she testified that appellant choked her. The question therefore arises on this record as to whether the testimony of appellee and her witnesses as true, the court was authorized under the statute in question to refuse of divorce. The authorities in this state are all to the effect that a decree of divorce can only be granted upon one or more of the grounds set forth in the statute. Henderson v. Henderson, 88 Ill. 143-150; Madrox v. Madrox, 189 Ill. 152-158; Winecke v. Winecke, 146 Ill. 147-150; Madrox v. Madrox, 189 Ill. 152-158. In the latter case, the court says: "The dissolution of the marriage relation is a grave matter and can only be justified where the case is strictly within the statute. The statute is sufficiently liberal in its provisions for cases of this kind. It has always been the policy of this court to construe a divorce statute liberally when the facts justify it." The court further held in numerous cases that one act is not sufficient to constitute extreme and repeated cruelty. Vincent v. Vincent, 18 Ill. 186-191; Winecke v. Winecke, 146 Ill. 147-150; Madrox v. Madrox, 189 Ill. 152-158. Our courts have also held that words, in and of themselves, do not constitute cruelty, but must be taken in connection with the facts. Winecke v. Winecke, 146 Ill. 147-150; Madrox v. Madrox, 189 Ill. 152-158. It is a positive requirement of the statute, that the husband shall be cruel and repeated in his conduct towards his wife to dissolve the marriage tie. One act is not, in this state, held to answer the requirements of the statute.

And the uniform construction given to the act by this court, as announced in a number of decided cases, is, that the cruelty must consist in physical violence, and not in angry or abusive epithets, or even profane language. The courts must enforce, and not enact, ~~law~~ ^{law}; and we feel compelled to enforce the statute as it has been enacted and heretofore expounded by the court.

"We are well aware that some other courts have held that cruelty may consist in mere angry or abusive words, menaces or indignities. But such is not the construction which has been placed upon our statute; and the construction it has received was announced many years since, and the general assembly, with whom the power is lodged, have not interposed to change the rule." See also: Henderson v. Henderson, supra, 250; Fizette v. Fizette, supra, 335; Maddox v. Maddox, supra, 154; Trenchard v. Trenchard, supra, 315.

While the statute, Chapter 40, sec. 1, Cahill's Statutes, provides as grounds for a divorce that the husband or wife "has attempted the life of the other by poison or other means showing malice," no authority has been cited holding that the making of a verbal threat against the life of another, without being accompanied by an overt act, constitutes an attempt to take life. We have made considerable search, and have been unable to find that our supreme or appellate courts have ever been called upon or have construed that provision of the statute in connection with what would constitute a ground for divorce thereunder.

In Scott v. People, 141 Ill. 204, plaintiff in error was indicted for an attempt to produce an abortion. The court there says: "Although the statute does not use the word 'intent', yet the word 'attempt', which it does use, necessarily includes intent. (Thompson v. The People, 96 Ill. 158). "An attempt is

the power is lodged, have not been shown to be in violation of the Constitution. See also: Hickman v. Thompson, 100 U.S. 683; Thompson v. Hickman, 100 U.S. 709; Wright v. Wright, 100 U.S. 713.

[illegible]

intent. (Thompson v. The People, 38 Ill. 158). "An attempt is yet the word 'attempt', which it does use, necessarily includes there says: "Although the statute does not use the word 'intent', was intended for an attempt to procure a verdict."

an intent to do a particular thing with an act toward it falling short of the thing intended.' (1 Bishop on Crim. Law, sec. 728).

* * * 'It seems impossible to doubt, that the only distinction between an intent, and an attempt to do a thing, is, that the former implies the purpose only, while the latter implies both the purpose and an actual effort to carry that purpose into execution.' (Prince v. State, 35 Ala. 367; Lewis v. State, id. 380; Gray v. State, 63 id. 73; Hart v. State, 38 Tex. 382; Johnson v. State, 14 Ga. 55)."

We are of the opinion and hold that the reading of the statute clearly discloses that the attempt upon the life referred to contemplates some overt act.

Under the authorities cited, we hold that the evidence fails to sustain the charge of extreme and repeated cruelty. The bill does not charge an attempt on the life of appellee as contemplated by the statute, and, even if charged, the evidence fails to sustain a charge of that character. It might also be observed that, while appellee testifies that she fears appellant will take her life, yet the evidence discloses that since the making of the last threat, as testified to by appellee, she has been in company with appellant, without apparently entertaining any fear of him.

For the reasons above set forth, the judgment and decree of the trial court will be reversed and the cause will be remanded, with directions to dismiss appellee's bill for want of equity.

Reversed and remanded, with directions.

on which it is a matter of course with an act toward its falling short of the proper standard. (1 Bishop on Crim. Law, sec. 725). It is also impossible to doubt, that the only distinction between an actual and an attempt to commit a crime, is that the former implies the purpose only, while the latter implies both the purpose and an actual effort to carry that purpose into execution. People v. Jones, 38 Ala. 207; People v. Jones, 38 Ala. 207; People v. Jones, 38 Ala. 207; People v. Jones, 38 Ala. 207; People v. Jones, 38 Ala. 207.

It is of the opinion of the court that the evidence in the case clearly discloses that the attempt to commit the crime failed to consummate some overt act. Under the authorities cited, we will not say that the failure to consummate the crime is evidence of intent to commit the crime, but it does not negate an attempt on the part of the accused to commit the crime, and, even if charged, the evidence fails to establish a charge of that character. It might also be observed that, while the evidence testifies that the fear of the appellant will be met, yet the evidence discloses that since the making of the last threat, as testified to by the appellee, she has been in company with the appellant, without apparently entertaining any fear of him. For the reasons above stated, the judgment of the court will be reversed, with directions to dismiss the appellant's bill for want of equity.

IN REPLY TO THE ORDER OF THE COURT, REVERSED AND REMANDED, WITH DIRECTIONS.

STATE OF ILLINOIS, } ss.

SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

6078a

2451.A. 640^{#1}

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. ~~AUGUSTUS A. PARFLOW~~ ^{FRANKLIN H. BOGGS} Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 29 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

of our Lord one thousand nine hundred and twenty-seven.
before, on Tuesday, the fifth day of April.

On
the opinion of the Court was filed in the
of Court, in the words and figures

IN THE
APPELLATE COURT OF ILLINOIS,
Second District.

April Term, A. D., 1937.

Appeal from the
Circuit Court of
Peoria County.

Appellee,

-vs-

SUBSCRIBERS AT RILLANCE
AUTOMOBILE INSURANCE
COMPANY,

Appellants.

OPINION BY BOGGS, J.

Appellee instituted suit in the circuit court of Peoria County against appellants on an automobile insurance policy covering a Jordan automobile owned by appellee and which had been destroyed by fire.

The first count of the declaration charges, among other things, that said automobile was totally destroyed by fire "in a manner wholly unknown to and without the aid or connivance of the plaintiff." The second count charges that said automobile was stolen from the possession of appellee "without the aid or connivance of the said plaintiff," and by some person, at Peoria, after said automobile was in the plaintiff's household or in the plaintiff's service or employment." The third count charges that said car was stolen and totally destroyed by fire "in a manner wholly

unknown to and without the aid or connivance of the plaintiff," etc.

To said declaration appellants filed a plea of the general issue and notice of special defenses thereunder, as follows:

1. That said automobile described in said policy, attached to said declaration, was not stolen, but was removed to the place where it was burned by the plaintiff personally or by another, or others, with his knowledge and consent.

2. That said automobile was set fire to by the said plaintiff or by another or others with his knowledge and consent.

A trial was had, resulting in a verdict and judgment in favor of appellee for \$900. To reverse said judgment, this appeal is prosecuted.

The testimony on the part of appellee tends to prove that his automobile was in his garage on the night of August 12th, 1925 and was found the following morning to have been destroyed by fire; that he had locked the transmission the night before, and that the same was still locked when found after said fire; that the wreck of the automobile disclosed that previous to the fire it had been stripped of the greater part of its accessories.

On the part of appellants, the proof tends to show that appellee was seen the night before by some two or three disinterested witnesses in the vicinity where the wreckage of said automobile was discovered. One of the witnesses testified to the effect that he saw the car that was burned and another car at the place where said car was afterward found; that he saw two men talking together; that he saw "kind of a light flash up" * * * and "then the fire flared up"; that one of the men he saw there that night was appellee.

"...to and without the aid or assistance of the plaintiff."

To said declaration appellants filed a plea of the
general issue and notice of special defenses thereunder, as
follows:

1. That said automobile described in said policy,
attached to said declaration, was not stolen, but was removed
to the place where it was burned by the plaintiff personally
or by another, or others, with his knowledge and consent.
2. That said automobile was set fire to by the said
plaintiff or by another or others with his knowledge and consent.
A trial was had, resulting in a verdict and judgment
in favor of appellee for \$200. To reverse said judgment, this
appeal is presented.

The testimony on the part of appellee tends to prove
that his automobile was in his garage on the night of August 18th,
1935 and was found the following morning in two bad states
by him; that he had looked the transmission the night before,
and the same was still looked when found after said fire;
that the work of the automobile disclosed that previous to
the fire it had been stripped of the greater part of its
accessories.

On the part of appellant the proof tends to show
that appellee was seen the night before by some two or three
identified witnesses in the vicinity where the wreckage of
said automobile was discovered. One of the witnesses testified
to the effect that he saw the car that was burned and another
one of the witnesses said that he saw the car that was burned
and two were talking together; that he saw the car that was
burned and "then the fire flared up"; that one of
the men he saw there that night was the appellant.

The evidence, as to whether appellee had anything to do with the destruction of said automobile, was sharply conflicting. It was therefore necessary that the rulings of the court on the evidence and the instructions should have been without substantial error.

It is contended on the part of counsel for appellants that the court erred in permitting testimony in chief on behalf of appellee, over the objections of appellant, to the effect that appellee bore a good reputation for truth and veracity in the community where he resided, and also testimony to the effect that his general reputation for honesty, in the community where he resided, was good.

It is a well established principle of law that testimony as to the general reputation of a person for any particular trait of character is not admissible until that reputation has first been assailed. The court therefore erred in permitting testimony with reference to the general reputation of appellee for truth and veracity, for neither at that time nor at any other time during said trial was his reputation assailed. Tedens v. Schumers, 112 Ill. 263; McGee v. People, 139 Ill. 138.

It is the contention of counsel for appellants that, this being a civil suit, proof of the general character of appellee for honesty was not admissible, and, even if it be held to have been admissible, it was not admissible in chief. In answer thereto, counsel for appellee insists that the notice of said special defenses put appellee's character in issue, and thereby gave appellee the right to offer evidence of his general reputation as to honesty in the first instance, and that, even if the testimony was not properly admitted in chief, inasmuch as appellants afterward offered evidence in support of such special defenses, no prejudicial error to appellants resulted therefrom.

The evidence, as it related to the destruction of said automobile, was sharply conflicting. It was therefore necessary that the evidence of the court on this evidence and the instructions should have been without substantial error.

It is contended on the part of counsel for appellants that the court erred in permitting testimony in chief on the part of appellee, over the objection of appellants, to the effect that appellee bore a good reputation for honesty and veracity in the community where he resided, and also testimony to the effect that his general reputation for honesty, in the community where he resided, was good.

It is a well established principle of law that testimony as to the general reputation of a person for any particular trait of character is not admissible until that reputation has first been established. The court therefore erred in permitting testimony with reference to the general reputation of appellee for truth and veracity, for neither at that time nor at any other time

before said trial was his reputation established. Tebern v. Johnson, 112 Ill. 268; McGee v. People, 139 Ill. 188.

It is the contention of counsel for appellants that this being a civil suit, proof of the general character of appellee for honesty was not admissible; and, even if it be held to have been admissible, it was not admissible in chief. In answer thereto, counsel for appellee insists that the notice of said special defenses put appellee's character in issue, and thereby gave appellee the right to offer evidence of his general reputation as to honesty in the first instance, and that, even if the testimony was not properly admitted in chief, inasmuch as appellee afterwards offered evidence in support of such special defenses, no prejudicial error to appellants resulted therefrom.

While, as a general proposition, except in libel and slander cases covered by statute, evidence of the general reputation of a party is not ordinarily admissible in civil cases, except on the question of impeachment, we are of the opinion that in a case of this character, where a charge is made against a party which amounts to a felony, evidence as to the general reputation of such party on a trait of character involved, would be admissible. We are also of the opinion and hold that as appellee in effect was charged with arson, his character as to honesty was involved, and for that reason his general reputation as an honest man would properly be admissible, if testimony be offered by appellants in support of said charge. Jupitz v. People, 34 Ill. 516-521; People v. Koloski, 309 Ill. 468-472. We hold, however, that such testimony was not admissible in chief.

It is next contended by appellants that the court erred in giving appellee's modified instruction, first, because it is inconsistent with the allegations of the declaration and his first given instruction, and second, because it places on appellants the burden of proving the defense set up in their special defenses beyond a reasonable doubt.

In view of the allegations of appellee's declaration to the effect that he had nothing to do directly or indirectly with the taking of said car and causing it to be burned, and had no knowledge with reference thereto, and in view of appellee's first instruction, which stated to the jury that if he had proved by the evidence that "said automobile described in said policy of insurance was, during the time said policy was in full force and effect, stolen and burned by someone wholly unknown to the plaintiff and without his knowledge, consent,

While, as a general proposition, except in libel and

similar cases covered by statute, evidence of the general reputation of a party is not ordinarily admissible in civil cases,

except on the question of insanity, we are of the opinion that in a case of this character, where a charge is made against

a party which amounts to a felony, evidence as to the general

reputation of such party on a trait of character involved would be admissible. We are also of the opinion and hold that

as appellee in effect was charged with arson, his character as to honesty was involved, and for that reason his general

reputation as an honest man would properly be admissible. If testimony be offered by appellee in support of said charge,

People v. People, 34 Ill. 516-521; People v. Kohn, 309 Ill. 418-422. We hold, however, that such testimony is not

admissible in chief.

It is next contended by appellee that the court erred

in giving appellee's modified instruction, first, because it is

inconsistent with the allegations of the declaration and his

first and last instruction, and second, because it places on

appellee the burden of proving the defense set up in their

special defense beyond a reasonable doubt.

In view of the allegations of appellee's declaration

to the effect that he had nothing to do directly or indirectly

with the taking of said car and causing it to be burned, and had

no knowledge with reference thereto, and in view of appellee's

first instruction, which stated to the jury that if he had

proved by the evidence that "said automobile described in said

policy of insurance was, during the time said policy was in

full force and effect, stolen and burned by someone wholly

known to the plaintiff and without his knowledge, consent,

connivance or approval, and not by the plaintiff or any person in the plaintiff's service or employment, either during or outside the hours of such service or employment," etc., appellee would not be in a position to insist that appellants make proof of said special defenses beyond a reasonable doubt.

Said modified instruction is also inconsistent in its language, for the reason that it states to the jury that if the "plaintiff has proved each and every material fact in counts one and two of his declaration by the greater weight of the evidence, and the defendants have failed to prove the defense above mentioned beyond a reasonable doubt, then your verdict should be for the plaintiff." In other words, it tells the jury that if appellee has proved by a preponderance of the evidence that said automobile had been stolen and burned and that he had nothing whatever to do with the same, that then before they could find for appellants, they must find that appellants had proved beyond a reasonable doubt that appellee had either burned or assisted in burning said car, or that the same had been burned by another or others with his knowledge, acquiescence or consent. The court erred in giving this instruction.

In People v. Small, 319 Ill. 437, it was sought to raise the question as to whether when a felony has been charged in a civil case, it must be proved beyond a reasonable doubt. The court at page 481 says:

"It is finally contended that criminal acts are charged in the bill in this suit, and that the rule that such charges must be proven beyond a reasonable doubt before a decree can be entered against the party so charged is applicable. We shall not lengthen this opinion by discussing this question. Whether this court will again apply to civil actions the rule

conviction or approval, and not by the plaintiff or any person in the plaintiff's service or employment, either during or outside the hours of such service or employment," etc., etc. would not be in a position to insist that appellants make proof of said special defenses beyond a reasonable doubt.

Said modified instruction is also inconsistent in its language, for the reason that it states to the jury that if the "plaintiff has proved each and every material fact in counts

one and two of his declaration by the greater weight of the evidence, and the defendants have failed to prove the defense above mentioned beyond a reasonable doubt, then your verdict should be for the plaintiff." In other words, it tells the

jury that if appellee has proved by a preponderance of the evidence that said automobile had been stolen and burned and that he had nothing whatever to do with the same, that then before they could find for appellants, they must find that

appellants had proved beyond a reasonable doubt that appellee had either burned or assisted in burning said car, or that the same had been burned by another or others with his knowledge, assistance or consent. The court erred in giving this instruction.

In People v. Small, 319 Ill. 437, it was sought to raise the question as to whether when a felony has been charged in a civil case, it must be proved beyond a reasonable doubt. The court at page 481 says:

"It is finally contended that criminal acts are charged in the bill in this suit, and that the rule that such charges must be proven beyond a reasonable doubt before a defense can be entered against the party so charged is applicable. We shall not lengthen this opinion by discussing this question. This court will again apply to civil actions the rule

of evidence applicable to criminal cases merely because the pleadings charge and the proof shows that the loss or damages arose out of a criminal act (see Rost v. Noble & Co., 316 Ill. 357), need not be decided in this case, for the reason that whatever rule is applied, the evidence in this record shows, beyond all reasonable doubt, a liability to account."

Appellee has assumed in his pleadings and in his first instruction that the burden is upon him to prove that he did not burn said car or assist therein, and that the same was not taken by anyone in his employ or with his knowledge or acquiescence. He is therefore not in a position to urge the application of the rule requiring that proof of the defense in this case be made beyond a reasonable doubt.

This being the state of the record, the court erred in refusing to give appellant's first and second refused instructions. The first refused instruction tells the jury that if they believe from the evidence that the automobile in question "was burned by or with the knowledge and consent of the plaintiff, then you should find the issues joined for the defendants." This instruction is in line with appellee's theory, as set forth in his declaration and in his first given instruction.

Appellants' second refused instruction tells the jury that in order for plaintiff to recover, he must prove his case by a preponderance of the evidence. This instruction states a correct principle of law, and should have been given.

Counsel for appellants failed to number the given and refused instructions, as provided by the rules of this court. Counsel in preparing abstracts, should be careful to observe this requirement as, in passing on the instructions, it is much more convenient if they are designated by number.

For the reasons above set forth, the judgment of the

-7-

trial court will be reversed and the cause will be remanded.

Reversed and Remanded.

(Faint, illegible text)

• Admission Fee \$100.00

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
'SEP 29 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

THAT THE COURT OF APPEALS IN
AND THE COURT OF APPEALS
THE STATE OF ILLINOIS

HON. THOMAS M. TERRY, President
HON. NORMAN L. JONES
HON. RICHARD E. ROBERTS, Jr.
JUSTUS M. JOHNSON, Clerk
1971

Term No. 67.

Agenda No. 60.

In The
APPELLATE COURT OF ILLINOIS.

Second District.

APRIL TERM, A. D. 1927.

A. E. HART,
Appellant,
-VS-
CHARLES ALLEN,
Appellee.

Appeal from the
Circuit Court of
Winnebago County

OPINION by BOGGS, J.

Appellant, a real estate broker, brought suit in assumpsit in the circuit court of Winnebago county against appellee and his wife, Grace Allen, to recover commissions alleged to be due him from said parties.

The declaration consists of the common counts and one special count, which set forth that on July 30th, 1925, appellee and his wife listed with appellant certain real estate owned by them in Rockford, Illinois, for sale, and verbally agreed to pay commissions on the sale of said property; that appellant thereafter procured Earl Bartley, and Alice Bartley, who agreed to exchange for said real estate owned by appellees certain real estate in the state of Nebraska, and to pay in addition the sum of \$15,000 in cash; that appellant reported said proposition to

7786

In The
APPELLATE COURT OF ILLINOIS,

Second District.

APRIL TERM, A. D. 1927.

Appeal from the
Circuit Court of
Winnebago County

A. E. WERT,
Appellant.
-vs-
CHARLES ALLEN,
Appellee.

OPINION BY ROGERS, J.

Appellant, a real estate broker, brought suit in assumpsit in the circuit court of Winnebago county against appellee and his wife, Grace Allen, to recover commissions alleged to be due him from said parties.

The declaration consists of the common counts and one special count, which set forth that on July 30th, 1925, appellee and his wife listed with appellant certain real estate owned by them in Rockford, Illinois, for sale, and verbally agreed to pay commissions on the sale of said property; that appellant thereafter procured Earl Bartley, and Alice Bartley, who agreed to exchange for said real estate owned by appellees certain real estate in the state of Nebraska, and to pay in addition the sum of \$15,000 in cash; that appellant reported said proposition to

appellee and his said wife and "that the said defendants then and there agreed with the plaintiff and with Earl Bartley and Alice Bartley to accept the piece or parcel of land owned by the said Earl Bartley and Alice Bartley and the sum of \$15,000 in cash."

Said declaration further avers that appellant explained to appellee and his said wife that he, appellant, was the broker, not only for appellee and his wife, but also for the Bartleys, and that appellee and his wife were to pay him \$825.00 and the Bartleys \$412.50, and that appellee and his wife agreed thereto; that appellee investigated the real estate owned by the Bartleys, and that he and his wife "verbally accepted the said sale, and the said Charles Allen entered into a written agreement marked exhibit a and made a part hereof, and that the said Grace Allen thereafter verbally accepted the said real estate deal as outlined by the plaintiff hereinabove, but because of some difficulty between Charles Allen and Grace Allen, the said Grace Allen refused to sign said contract." Appellant further avers that he found a purchaser for the premises of appellee and his said wife, on terms acceptable to them, and that he had thereby earned his commissions of \$825.00.

To said declaration appellee filed a plea of the general issue and a special plea with an affidavit of merits. A demurrer was filed to the special plea and was sustained. Thereupon appellee obtained leave to amend his affidavit of merits, and filed notice of special defense, in which notice appellee set forth that appellant was a part owner in the premises claimed to be owned by the Bartleys, and that he concealed his interest therein from appellee.

Appellant dismissed his suit against Grace Allen, and the cause proceeded to trial against appellee alone. At the close of appellant's evidence, a motion was made by appellee to exclude

appellee and his said wife and "that the said defendants then and there agreed with the plaintiff and with Earl Bartley and Alice Bartley to accept the piece or parcel of land owned by the said Earl Bartley and Alice Bartley and the sum of \$15,000 in cash."

Said declaration further avers that appellee explained to appellee and his said wife that he, appellee, was the broker, not only for appellee and his wife, but also for the Bartleys, and that appellee and his wife were to pay him \$825.00 and the Bartleys \$412.50, and that appellee and his wife agreed thereto; that appellee investigated the real estate owned by the Bartleys, and that he and his wife verbally accepted the said sale, and the said Charles Allen entered into a written agreement marked exhibit A and made a part hereto, and that the said Grace Allen thereafter verbally accepted the said real estate deal as outlined by the plaintiff heretofore, but because of some difficulty between Charles Allen and Grace Allen, the said Grace Allen refused to sign said contract." Appellant further avers that he found a purchaser for the premises of appellee and his said wife, on terms acceptable to them, and that he had thereby earned his commissions of \$825.00.

To said declaration appellee filed a plea of the general issue and a special plea with an affidavit of merits. A demurrer was filed to the special plea and was sustained. Thereupon appellee obtained leave to amend his affidavit of merits, and filed notice of special defense, in which notice appellee set forth that appellant was a part owner in the premises claimed to be owned by the Bartleys, and that he concealed his interest therein from appellee.

Appellant dismissed his suit against Grace Allen, and the case proceeded to trial against appellee. At the close of appellee's evidence, a motion was made for judgment on the facts.

the evidence and to direct a verdict in his favor. This motion was denied. At the close of all of the evidence, a like motion was made. The court granted said motion, directed a verdict in favor of appellee, and rendered judgment against appellant in bar of action and for costs. To reverse said judgment, this appeal is prosecuted. It is contended by appellant that the court erred in directing said verdict, and in rendering judgment against him in bar of action and for costs. (To reverse said judgment, this appeal is prosecuted. It is contended by appellant that the court erred in directing said verdict, and in rendering judgment against him in bar of action and for costs.)

The evidence on the part of appellant was to the effect that appellee and his wife listed certain property with him for sale at \$25,000. Appellant testified: "I showed the property to a great many people, or different ones, and finally I made a proposition of exchanging the property with Mr. Allen. The negotiations extended over quite a period before there was anything consummated. I told Mr. Allen I thought I could make a deal for a 280-acre tract of land in Nebraska and give him the cash difference of the properties." He further testified that he and appellee went out to Nebraska to look at the land; that they examined the land thoroughly and that appellee expressed himself as satisfied with the land; that a week or so after their return to Rockford, appellee came to his office and told him he was ready to go ahead and close up the deal; that a contract was prepared for the exchange of the property owned by appellee and his wife for the 280 acres of land in Nebraska; that appellee finally signed the same but that his wife, while she expressed herself as satisfied with the deal, said she wanted the contract examined by her attorney; that thereafter appellee's wife stated that she would not go on with the transaction for the reason that

the evidence and to direct a verdict in his favor. This motion was denied. At the close of all of the evidence, a like motion was made. The court granted said motion, directed a verdict in favor of appellee, and rendered judgment against appellant in favor of appellee and for costs. To reverse said judgment, this appeal is prosecuted. It is contended by appellant that the court erred in directing said verdict, and in rendering judgment against him in favor of appellee and for costs. To reverse said judgment, this appeal is prosecuted. It is contended by appellant that the court erred in directing said verdict, and in rendering judgment against him in favor of appellee and for costs. The evidence on the part of appellant was to the effect that appellee and his wife listed certain property with him for sale at \$25,000. Appellant testified: "I showed the property to a great many people, or different ones, and finally I made a proposition of exchanging the property with Mr. Allen. The negotiations extended over quite a period before there was anything consummated. I told Mr. Allen I thought I could make a deal for a 280-acre tract of land in Nebraska and give him the cash difference of the properties." He further testified that he and appellee went out to Nebraska to look at the land; that they examined the land thoroughly and that appellee expressed himself as satisfied with the land; that a week or so after their return to Rockford, appellee came to his office and told him he was ready to go ahead and close up the deal; that a contract was prepared for the exchange of the property owned by appellee and his wife for the 280 acres of land in Nebraska; that appellee himself signed the same but that his wife, while she expressed herself as satisfied with the deal, said she wanted the contract examined by her attorney; that thereafter appellee's wife stated that she would not go on with the transaction for the reason that

appellee, her husband, would not make a satisfactory division with her of the cash payment of \$15,000.

On cross examination appellant testified to the effect that he had executed a quit claim deed of the Nebraska land to the Bartleys, under date of March 1, 1924, but that at the time he showed said land to appellee he did not own the same, the evidence being to the effect that the Northwestern National Bank at that time was the owner of an undivided one-half interest therein. Appellant's testimony in this connection was as follows:

"I gave Bartley a quit claim deed. I didn't sell the bank's interest; I couldn't. The bank does not own it now. They disposed of their title over a year ago, last July, I think it was. They deeded it to me a year ago last July. The deed from the bank was put on record about the 15th of October, I think, in 1925. At the time Mr. Allen went out to look at the land I did not hold the bank's interest. The deed from the bank was here in town, but I did not have it at that time. I got it in July; the latter part of July, 1925. It was at the Swedish American Bank. It deeded the property to me in my name."

Appellant was allowed to testify, over the objection of appellee, that on July 30th, 1925, being the date of the contract alleged to have been signed by appellee, the Bartleys were ready, able and willing to carry out the provisions of said contract and transfer the Nebraska land to appellee and his wife.

The deed from appellant to the Bartleys, being a quit claim deed, would "not extend to after-acquired title, unless words are added expressing such intention," under the provisions of sec. 10, chapter 30, Cahill's Statutes. This is also the holding of the supreme court in DuBois v. Judy, 291 Ill. 340-347; Thornton v. Louch, 297 Ill. 204-210.

An examination of the quit claim deed in question

appealed, her husband, would not make a satisfactory division with her of the cash payment of \$15,000. The court granted said motion.

On cross examination appellant testified to the effect that he had executed a quit claim deed of the Nebraska land to two Bartleys, under date of March 1, 1934, but that at the time

he showed said land to appellee he did not own the same, the evidence being to the effect that the Northwestern National Bank at that time was the owner of an undivided one-half interest

therein. Appellant's testimony in this connection was as follows:

"I gave Bartley a quit claim deed. I didn't sell the

bank's interest; I couldn't. The bank does not own it now. They

disposed of their title over a year ago, last July. I think it

was. I got deeded it to me a year ago last July. The deed from

the bank was put on record about the 15th of October, I think,

in 1935. At the time Mr. Allen went out to look at the land I

did not hold the bank's interest. The deed from the bank was

made in town, but I did not have it at that time. I got it in

July; the latter part of July, 1935. It was at the Swedish

American Bank. It deeded the property to me in my name."

Appellant was allowed to testify, over the objection

of appellee, that on July 30th, 1935, being the date of the

contract alleged to have been signed by appellee, the Bartleys

were ready, able and willing to carry out the provisions of said

contract and transfer the Nebraska land to appellee and his wife.

The deed from appellant to the Bartleys, being a quit

claim deed, would "not extend to after-acquired title, unless

words are added expressing such intention," under the provisions

of sec. 10, chapter 30, Genl. Statutes. This is also the

holding of the supreme court in Dubois v. Wey, 201 Ill. 240-247; Wey v. Dubois, 207 Ill. 204-210.

An examination of the quit claim deed in question

clearly discloses that it does not purport to cover after-acquired titles. It therefore follows as a legal conclusion that the Bartleys were not the owners of the Nebraska land on July 30th, 1925, and were not ready, able and willing to convey the title thereto to appellee and his wife. Whatever title the Bartleys had to the Nebraska land was under the quit claim deed from appellant, and appellant in his testimony clearly discloses that such was the case. The quit claim deed from appellant to the Bartleys was not filed for record, and so far as the record title to said premises is concerned, it was shown to be in appellant and said bank, each owning an undivided half interest thereon. The Bartleys did not testify, and there is nothing in the record to show that they had the \$15,000 or could have procured the same, other than the bare statement of appellant that they were ready, able and willing to carry out said contract. This statement must necessarily be a conclusion on his part.

We therefore hold that the court, for the reasons stated, was warranted in directing a verdict. However, we are also of the opinion and hold that, inasmuch as the evidence discloses that appellant was the owner of an undivided half interest in the Nebraska land, and inasmuch as the evidence fails to disclose that appellee had any knowledge thereof or that appellant informed him or gave him any notice to that effect, such concealment would be a bar to a recovery by appellant.

An agent for the sale of property is prohibited from having any interest in the sale, directly or indirectly, without the consent of his principal, given after full knowledge of every fact known to the agent which might affect the principal's interest. Johnson v. Bernard, 323 Ill. 527-529; Fox v. Simons, 251 Ill. 316-321; Tyler v. Sanborn, 123 Ill. 136-143; Tewksbury v. Spruance, 75 Ill. 187-188. And it is of no consequence in such case that no

123 Ill. 127-128. 124 Ill. 129-130. 125 Ill. 131-132. 126 Ill. 133-134. 127 Ill. 135-136. 128 Ill. 137-138. 129 Ill. 139-140. 130 Ill. 141-142. 131 Ill. 143-144. 132 Ill. 145-146. 133 Ill. 147-148. 134 Ill. 149-150. 135 Ill. 151-152. 136 Ill. 153-154. 137 Ill. 155-156. 138 Ill. 157-158. 139 Ill. 159-160. 140 Ill. 161-162. 141 Ill. 163-164. 142 Ill. 165-166. 143 Ill. 167-168. 144 Ill. 169-170. 145 Ill. 171-172. 146 Ill. 173-174. 147 Ill. 175-176. 148 Ill. 177-178. 149 Ill. 179-180. 150 Ill. 181-182. 151 Ill. 183-184. 152 Ill. 185-186. 153 Ill. 187-188. 154 Ill. 189-190. 155 Ill. 191-192. 156 Ill. 193-194. 157 Ill. 195-196. 158 Ill. 197-198. 159 Ill. 199-200. 160 Ill. 201-202. 161 Ill. 203-204. 162 Ill. 205-206. 163 Ill. 207-208. 164 Ill. 209-210. 165 Ill. 211-212. 166 Ill. 213-214. 167 Ill. 215-216. 168 Ill. 217-218. 169 Ill. 219-220. 170 Ill. 221-222. 171 Ill. 223-224. 172 Ill. 225-226. 173 Ill. 227-228. 174 Ill. 229-230. 175 Ill. 231-232. 176 Ill. 233-234. 177 Ill. 235-236. 178 Ill. 237-238. 179 Ill. 239-240. 180 Ill. 241-242. 181 Ill. 243-244. 182 Ill. 245-246. 183 Ill. 247-248. 184 Ill. 249-250. 185 Ill. 251-252. 186 Ill. 253-254. 187 Ill. 255-256. 188 Ill. 257-258. 189 Ill. 259-260. 190 Ill. 261-262. 191 Ill. 263-264. 192 Ill. 265-266. 193 Ill. 267-268. 194 Ill. 269-270. 195 Ill. 271-272. 196 Ill. 273-274. 197 Ill. 275-276. 198 Ill. 277-278. 199 Ill. 279-280. 200 Ill. 281-282. 201 Ill. 283-284. 202 Ill. 285-286. 203 Ill. 287-288. 204 Ill. 289-290. 205 Ill. 291-292. 206 Ill. 293-294. 207 Ill. 295-296. 208 Ill. 297-298. 209 Ill. 299-300. 210 Ill. 301-302. 211 Ill. 303-304. 212 Ill. 305-306. 213 Ill. 307-308. 214 Ill. 309-310. 215 Ill. 311-312. 216 Ill. 313-314. 217 Ill. 315-316. 218 Ill. 317-318. 219 Ill. 319-320. 220 Ill. 321-322. 221 Ill. 323-324. 222 Ill. 325-326. 223 Ill. 327-328. 224 Ill. 329-330. 225 Ill. 331-332. 226 Ill. 333-334. 227 Ill. 335-336. 228 Ill. 337-338. 229 Ill. 339-340. 230 Ill. 341-342. 231 Ill. 343-344. 232 Ill. 345-346. 233 Ill. 347-348. 234 Ill. 349-350. 235 Ill. 351-352. 236 Ill. 353-354. 237 Ill. 355-356. 238 Ill. 357-358. 239 Ill. 359-360. 240 Ill. 361-362. 241 Ill. 363-364. 242 Ill. 365-366. 243 Ill. 367-368. 244 Ill. 369-370. 245 Ill. 371-372. 246 Ill. 373-374. 247 Ill. 375-376. 248 Ill. 377-378. 249 Ill. 379-380. 250 Ill. 381-382. 251 Ill. 383-384. 252 Ill. 385-386. 253 Ill. 387-388. 254 Ill. 389-390. 255 Ill. 391-392. 256 Ill. 393-394. 257 Ill. 395-396. 258 Ill. 397-398. 259 Ill. 399-400. 260 Ill. 401-402. 261 Ill. 403-404. 262 Ill. 405-406. 263 Ill. 407-408. 264 Ill. 409-410. 265 Ill. 411-412. 266 Ill. 413-414. 267 Ill. 415-416. 268 Ill. 417-418. 269 Ill. 419-420. 270 Ill. 421-422. 271 Ill. 423-424. 272 Ill. 425-426. 273 Ill. 427-428. 274 Ill. 429-430. 275 Ill. 431-432. 276 Ill. 433-434. 277 Ill. 435-436. 278 Ill. 437-438. 279 Ill. 439-440. 280 Ill. 441-442. 281 Ill. 443-444. 282 Ill. 445-446. 283 Ill. 447-448. 284 Ill. 449-450. 285 Ill. 451-452. 286 Ill. 453-454. 287 Ill. 455-456. 288 Ill. 457-458. 289 Ill. 459-460. 290 Ill. 461-462. 291 Ill. 463-464. 292 Ill. 465-466. 293 Ill. 467-468. 294 Ill. 469-470. 295 Ill. 471-472. 296 Ill. 473-474. 297 Ill. 475-476. 298 Ill. 477-478. 299 Ill. 479-480. 300 Ill. 481-482. 301 Ill. 483-484. 302 Ill. 485-486. 303 Ill. 487-488. 304 Ill. 489-490. 305 Ill. 491-492. 306 Ill. 493-494. 307 Ill. 495-496. 308 Ill. 497-498. 309 Ill. 499-500. 310 Ill. 501-502. 311 Ill. 503-504. 312 Ill. 505-506. 313 Ill. 507-508. 314 Ill. 509-510. 315 Ill. 511-512. 316 Ill. 513-514. 317 Ill. 515-516. 318 Ill. 517-518. 319 Ill. 519-520. 320 Ill. 521-522. 321 Ill. 523-524. 322 Ill. 525-526. 323 Ill. 527-528. 324 Ill. 529-530. 325 Ill. 531-532. 326 Ill. 533-534. 327 Ill. 535-536. 328 Ill. 537-538. 329 Ill. 539-540. 330 Ill. 541-542. 331 Ill. 543-544. 332 Ill. 545-546. 333 Ill. 547-548. 334 Ill. 549-550. 335 Ill. 551-552. 336 Ill. 553-554. 337 Ill. 555-556. 338 Ill. 557-558. 339 Ill. 559-560. 340 Ill. 561-562. 341 Ill. 563-564. 342 Ill. 565-566. 343 Ill. 567-568. 344 Ill. 569-570. 345 Ill. 571-572. 346 Ill. 573-574. 347 Ill. 575-576. 348 Ill. 577-578. 349 Ill. 579-580. 350 Ill. 581-582. 351 Ill. 583-584. 352 Ill. 585-586. 353 Ill. 587-588. 354 Ill. 589-590. 355 Ill. 591-592. 356 Ill. 593-594. 357 Ill. 595-596. 358 Ill. 597-598. 359 Ill. 599-600. 360 Ill. 601-602. 361 Ill. 603-604. 362 Ill. 605-606. 363 Ill. 607-608. 364 Ill. 609-610. 365 Ill. 611-612. 366 Ill. 613-614. 367 Ill. 615-616. 368 Ill. 617-618. 369 Ill. 619-620. 370 Ill. 621-622. 371 Ill. 623-624. 372 Ill. 625-626. 373 Ill. 627-628. 374 Ill. 629-630. 375 Ill. 631-632. 376 Ill. 633-634. 377 Ill. 635-636. 378 Ill. 637-638. 379 Ill. 639-640. 380 Ill. 641-642. 381 Ill. 643-644. 382 Ill. 645-646. 383 Ill. 647-648. 384 Ill. 649-650. 385 Ill. 651-652. 386 Ill. 653-654. 387 Ill. 655-656. 388 Ill. 657-658. 389 Ill. 659-660. 390 Ill. 661-662. 391 Ill. 663-664. 392 Ill. 665-666. 393 Ill. 667-668. 394 Ill. 669-670. 395 Ill. 671-672.

fraud was intended, or that no advantage was in fact derived by the agent. Tyler v. Sanborn, supra, 143; Fox v. Simons, supra, 321; Tewksbury v. Spruance, supra, 188. And where an agent sells to his principal his own property as the property of another, without disclosing the fact of his interest, this will be such a fraud in law as will give the principal the right to avoid the sale in toto. Ely v. Hanford, 65 Ill. 267-270.

As a general proposition, if an agent or broker employed to transact a particular business is guilty of bad faith to his principal, he thereby forfeits his right to commissions. Keach v. Bunn, 116 App. 397-402; Fidelity Trust Co., v. Poole, 136 App. 266-274; Jacobs v. Eide, 170 App. 524-527. The law further is that it makes no difference whether the result of the agent's conduct is injurious to his principal or not; in cases of this character the misconduct of the agent affects the contract from considerations of public policy, rather than of injury to the principal. Keach v. Bunn, supra, 402; Hafner v. Herron, 165 Ill. 242-247, also reported in 45 L. R. A., 336.

Counsel for appellant insists that inasmuch as the court did not direct a verdict at the close of appellant's evidence, it follows that the court was holding that there was evidence in the record which required that the case be submitted to the jury, and that, that being the case, the court at the close of all the evidence must have weighed the evidence in directing a verdict.

"The fact that the trial court refused to direct a verdict for the defendant at the close of the plaintiff's evidence, but directed such a verdict at the close of all the evidence, does not of itself show that the trial court weighed the evidence, and if the verdict was properly directed, it is not error." McDermott v. Burke, 256 Ill. 401-405.

trial was intended, or that no advantage was in fact derived by the agent. Tyler v. Gambohn, supra, 143; Fox v. Simons, supra, 321; Townshury v. Spinnace, supra, 138. And where an agent sells to his principal his own property as the property of another, without disclosing the fact of his interest, this will be such a fraud in law as will give the principal the right to avoid the sale in toto. Wily v. Hamford, 65 Ill. 267-270.

As a general proposition, if an agent or broker employed to transact a particular business is guilty of bad faith to his principal, he thereby forfeits his right to commissions. Kosch v. Barn, 116 App. 397-402; Fidelity Trust Co. v. Poole, 136 App. 286-274; Jacobs v. Hilde, 170 App. 324-327. The law further is that it makes no difference whether the result of the agent's conduct is injurious to his principal or not; in cases of this character the misconduct of the agent affects the contract from considerations of public policy, rather than of injury to the principal. Kosch v. Barn, supra, 402; Hainer v. Keston, 165 Ill. 442-247, also reported in 45 L. R. A., 336.

Counsel for appellant insists that inasmuch as the court did not direct a verdict at the close of appellant's evidence, it follows that the court was holding that there was evidence in the record which required that the case be submitted to the jury, and that, that being the case, the court at the close of all the evidence must have weighed the evidence in directing a verdict.

"The fact that the trial court refused to direct a verdict for the defendant at the close of the plaintiff's evidence, but directed such a verdict at the close of all the evidence, does not of itself show that the trial court weighed the evidence, and if the verdict was properly directed, it is not error." McDermott v. Burke, 256 Ill. 401-405.

There was no sufficient evidence in the record which, if taken as true, would fairly tend to prove appellant's case. The court therefore did not err in directing a verdict in favor of appellee.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

There was no indication of any other person
it taken as true, would fairly lead to those appellants' view.
The court therefore did not see fit to discuss a witness in favor
of appellants.
For the reasons stated, the judgment of the
trial court will be affirmed.

Judgment affirmed.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

STATE OF ILLINOIS,

} ss.

SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

General District of the State
of the following is
in my office
in Testimony
and Appraisal
this hundred and seven

608 2451.A. 640^{#3}

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. ~~AUGUSTUS A. PARTLOW~~ FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 29 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

AT A TERM OF THE SUPREME COURT

of Otago, on Thursday, the 11th day of April, 1902

for the Second District of the State of New Zealand

Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice

Justice.

1888. The Attorney-General, Wellington

to the said Court, in the words and figures

7793

In The

Second District.

April Term, A. D. 1927.

-vg-

RICHARD R. MEENTS, Formerly
Conservator and now Ex Officio
Administrator of the Estate of
Michael King, Deceased,
Appellee.

Appeal from the
Circuit Court of
Kankakee County.

OPINION by BOGGS, J.

During the pendency of said suit, Michael King departed this life, and the suit proceeded against appellee as the administrator of his estate.

The declaration as finally amended consists of the common counts amplified, a special count based on seven promissory notes signed by King and payable to appellant, and the common counts consolidated.

To said declaration a plea of the general issue was filed, and two special pleas. The first special plea avers among other things "that the execution of the writings or supposed promissory notes in said declaration mentioned was obtained from the said Michael King by the plaintiff by fraud and circumvention, that is to say, that the said plaintiff

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In the

APPELLATE COURT OF ILLINOIS,

Second District.

April Term, A. D. 1927.

Appeal from the
Circuit Court of
Kankakee County.

APPELLANT,
MICHAEL KING, Deceased.

-vs-

RICHARD W. KENNEDY, Executor,
Comptroller and now Ex-Officio
Administrator of the Estate of
MICHAEL KING, Deceased.
APPELLEE.

OPINION BY HOGGES, J.

An action in assumpsit was instituted in the circuit court of Kankakee County by appellant against appellee as comptroller of the estate of Michael King, deceased. During the pendency of said suit, Michael King departed this life, and the suit proceeded against appellee as the administrator of his estate. The declaration as finally amended consists of the common counts amplified, a special count based on seven promissory notes signed by King and payable to appellant, and the common counts consolidated. To said declaration a plea of the general issue was filed, and two special pleas. The first special plea avers among other things "that the execution of the writings or supposed promissory notes in said declaration mentioned was obtained from the said Michael King by the fraud of appellant and co-conspirators, and is to say, that the said Michael

secured the confidence of said Michael King and took advantage of the age and mental condition of the said Michael King; ~~and~~ t at the said Michael King was almost continually under the influence of liquor while he was boarding at the house of said plaintiff, and that he so used intoxicating liquor to the extent that he was easily influenced, and that his mind became in a weakened condition so that a conservator had to be appointed to care for his property; that ~~said~~ plaintiff, knowing of his mental condition, and knowing the fact that he was practically always under the influence of intoxicating liquor, falsely and fraudulently secured the execution of the said promissory notes by the said Michael King; that the said Michael King, confiding in said plaintiff and relying upon the said plaintiff, there executed the said writings without any consideration whatsoever."

The second special plea averred among other things "that said Michael King did not owe said plaintiff any money whatsoever for any reason; that said Michael King executed said notes while he was in such a mental state that he did not realize what he was doing, and that said plaintiff took advantage of the mental condition of said Michael King and secured the signatures of said Michael King to said promissory notes," etc.

A trial was had at the January term, 1926, resulting in a verdict in favor of appellant for the sum of \$2,000. Said verdict was set aside on motion of appellee, and on the second trial a verdict was returned in favor of appellant for \$14.00. Judgment was rendered on said verdict, and this appeal is prosecuted to reverse the same.

It is insisted by appellee that the abstract filed herein is defective in failing to set forth the pleadings in said cause, exceptions to judgment, etc., and that the judgment

should be affirmed by reason thereof. The declaration was not of a complicated character, and while the pleas are not as fully abstracted as they should have been, we have deemed best to consider the case on its merits.

The record discloses that appellant was the proprietress of a hotel in Kankakee, and that Michael King became a guest thereof on or about October, 1921, and so remained for the greater part of the time up to about January, 1924. During the time King resided at said hotel, he executed the seven notes here/in controversy, aggregating the principal sum of \$1,496.50, the first of said notes being dated November 26, 1921, All of said notes bore interest at the rate of 5% per annum from date.

It is the contention of appellant that King gave said notes to her in consideration of his board bill, room rent, laundry, etc., and for moneys which she had loaned to him, and that he never paid her anything on said account, except by the notes here in question.

In January, 1923, in a trial had in the County Court of Iroquois County, Michael King was found to be a spendthrift and a drunkard, and one T. J. Fruin was appointed conservator of his estate. Thereafter Fruin was succeeded by appellee as such conservator. Two of the notes sued on bore date subsequent to the appointment of said conservator, and it was conceded by counsel for appellant on the trial that no recovery could be had thereon, but it was insisted that she was entitled to recover for the alleged board, room rent, laundry bill, etc., for which she claims said notes were given.

On the part of appellee it is insisted ~~there~~ that there was no consideration for the giving of said notes, and that King was procured to execute the same while he was so

It is the contention of appellant that King gave
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him, and that he never paid her anything on said account.

intoxicated that he did not know what he was doing, and further, that by the admissions of appellant herself, King only owed her for one week's board and room rent.

This case will have to be reversed on account of the rulings of the court on the instructions. We will therefore not go into the evidence in detail, nor express any opinion on the merits of the case.

It is the contention of counsel for appellant that the court erred in refusing her instruction number one to the effect that the evidence in the record was insufficient "to prove that the notes in question were procured from Michael King while in a state of intoxication to such an extent that he was incapable of understanding that he was signing and executing" said notes.

To render a transaction voidable on account of the drunkenness of a party to it, the drunkenness must have been such as to have drowned reason, memory and judgment, and to have impaired the mental faculties to such an extent as to render the party non compos mentis for the time being. *Martin v. Harsh*, 231 Ill. 384-389; *Bates v. Ball*, 72 Ill. 108; *Watson v. Doyle*, 130 Ill. 415; *Dollman v. Gaugente*, 238 Ill. 224-228.

While the evidence discloses that King was addicted to the use of intoxicating liquors, and at times became intoxicated to the extent that he would not have been competent to transact business, yet the evidence is also clearly to the effect that there were other times when he was sober. There is nothing in the evidence to show his condition at the time he gave any of the notes sued on. The court therefore erred in refusing to give said instruction. There was evidence in the record on the part of appellee to the effect that liquors were at times given to Michael King by appellant, which may have contributed to his intoxication, and while under some

indicated that he did not know what he was doing, and further, that he was not aware of the admissions of appellant herself. King only owed her for one week's board and room rent. This case will have to be reversed on account of the rulings of the court on the instructions. We will therefore not go into the evidence in detail, nor express any opinion on the merits of the case.

It is the contention of counsel for appellant that the court erred in refusing her instruction number one to the effect that the evidence in the record was insufficient to prove that the notes in question were procured from Michael King while in a state of intoxication to such an extent that he was incapable of understanding that he was signing and executing said notes.

To render a transaction voidable on account of the drunkenness of a party to it, the drunkenness must have been such as to have destroyed reason, memory and judgment, and to have impaired the mental faculties to such an extent as to render the party non compos mentis. For the time being. *Marston v. Bates*, 281 Ill. 384-389; *Bates v. Ball*, 78 Ill. 108; *Watson v. Taylor*, 119 Ill. 415; *Dolman v. Gengente*, 288 Ill. 284-289.

The evidence discloses that King was addicted to the use of intoxicating liquors, and at times became intoxicated to the extent that he would not have been competent to transact business, yet the evidence is also clearly to the effect that there were other times when he was sober. There is nothing in the evidence to show his condition at the time he gave any of the notes sued on. The court therefore erred in refusing to give said instruction. There was evidence in the record on the part of appellee to the effect that liquors were at times given to Michael King by appellant, which may have contributed to his intoxication, and while under some

circumstances that might be proof tending to show that the notes in question were fraudulently obtained, yet that charge is not made in the plea; in other words, the plea does not allege that the intoxication of King was procured by appellant.

It is also contended that the court erred in refusing to give appellant's second refused instruction, being: "That the evidence in this case is not sufficient under the law to prove that the notes in question were obtained from Michael King by the plaintiff by fraud and misrepresentation, and upon that issue you should find for the plaintiff."

Counsel for appellee and counsel for appellant both treat the second special plea as a plea of fraud and circumvention. We have set the plea out somewhat in detail, and question whether, taking the plea as a whole, it will bear that construction. However, as that construction has been adopted by said parties, we will treat it as a plea of fraud and circumvention.

In *Bezely v. Searl*, 230 App. 392, the court in discussing fraud in the procurement of the execution of a note, at page 398 says: "Fraud in the execution of the note does not avail unless the maker was induced to sign a note prejudicially different from the instrument he was willing to sign, and which he thought he was signing. *Sinnickson v. Richter*, 140 App. 212. The fraud and circumvention must consist of some trick or device which induced the making of one kind of instrument under the belief that the maker was giving one of a different character." Citing *Gray v. Goode*, 72 App. 504.

There is no evidence in this record showing or tending to show that any trick or device was used to procure the signature of Michael King to any of the notes here sued on, or that he was tricked into believing he was signing some other character of instrument when he was in fact signing the above mentioned

circumstances that it is not possible to say that the notes in question were fraudulently obtained, but that they are not made in the plea; in other words, the plea does not allege that the intoxication of King was procured by appellant. It is also contended that the court erred in refusing to give appellant's second revised instruction, being: "That the evidence in this case is not sufficient under the law to prove that the notes in question were obtained from Michael King by the plaintiff by fraud and misrepresentation and upon this issue you should find for the plaintiff." Counsel for appellee and counsel for appellant both treat the second special plea as a plea of fraud and circumvention. We have set the plea out somewhat in detail, and, treating the plea as a whole, it will bear this construction. However, as that construction has been adopted by said parties, we will treat it as a plea of fraud and circumvention. In *Bessly v. Bessly*, 230 App. 222, the court in discussing the plea in the promissory note of a note, at page 222 says: "That in the execution of the note does not avail itself the maker was induced to sign a note premeditatedly different from the instrument he was willing to sign, and which he did not he was signing. *Shunkelson v. Richter*, 140 App. 212. The fraud and circumvention must consist of some trick or device which induced the making of one kind of instrument or another. It is not sufficient that the maker was giving one of a different character." *Quitting Gray v. Goode*, 72 App. 204. There is no evidence in this record showing or tending to show that any trick or device was used to procure the signature of Michael King to any of the notes here shown on, or that he was induced into believing he was signing some other character of instrument when he was in fact signing the above mentioned

promissory notes. We therefore hold the court erred in refusing to give appellant's ~~second~~ refused instruction.

It is also contended that the court erred in refusing to give appellant's sixth, seventh and ninth refused instructions. We have examined these instructions, and are of the opinion and hold that the instruction in each particular case is not well guarded. As tendered, said instructions would have been misleading. The court therefore did not err in refusing the same.

It is next contended that the court erred in giving the twenty-second, twenty-third, thirty-fifth, thirty-seventh, and thirty-eighth instructions given on behalf of appellee.

Appellee's given instruction twenty-two is as follows:

"The Court instructs the jury that, as between the maker and payee of a promissory note, evidence touching the consideration thereof may be considered by you, and if you find from the evidence that the deceased, Michael King, received no consideration for the signing and execution of the notes sued on, then you should find the issues for the defendant as to such notes."

There was no evidence on which to base this instruction. The evidence on the part of appellant, as testified by Lock, the Clerk of said Hotel, was to the effect that at least a part of said notes were given by King in payment for his board, room rent, laundry bill and moneys advanced to him by appellee; that he, Lock, would compute said amounts and that King would execute his note therefore, and that King never, in fact, paid any board, room rent or laundry bills, so far as this witness' information went, except by note. The only evidence offered by appellee to the effect that King was not indebted on said notes was certain testimony offered to the effect that appellant had stated on the conservatorship hearing in Iroquois County that King did not owe her anything, and certain statements

promissory notes. We therefore will not attempt to establish
to give appellant's account as being correct.

It is also contended that the court erred in refusing

to give appellant's sixth, seventh and eighth instructions.

We have examined these instructions, and are of the opinion that

both of the instructions are correct and will be given.

Appellant's contention that the instructions were given in error

is without merit. The court therefore will not err in refusing to give

It is now contended that the court erred in refusing to give

the twenty-second, twenty-third, twenty-fourth, twenty-fifth, and

and thirty-sixth instructions given on behalf of appellee.

Appellant's given instruction twenty-two is as follows:

"The Court instructs the jury that, as between the

maker and payee of a promissory note, evidence touching the

consideration thereof may be considered by you, and if you find

from the evidence that the deceased, Michael King, received no

consideration for the signing and execution of the notes and

that you should find the issues for the defendant as to

and return.

There was no evidence on which to base this instruction.

The evidence on the part of appellant, as testified

look the clerk of said Hotel, was to the effect that at least

a part of said notes were given by King in payment for his board,

room rent, laundry bill and money advanced to him by appellee;

that he, look, would compute said accounts and that King would

execute his note therefor, and that King never, in fact, paid

any money, room rent or laundry bills, so far as this witness

testimony went, except by note. The only evidence offered

by appellee to the effect that King was not indebted on said

notes was certain testimony offered to the effect that appellant

had stated on the commonwealth's hearing in Indiana County

that King did not owe anything, and certain statements

she was claimed to have made out of court to certain of the children of King, that King did not owe her anything except for one week's board and room rent. This being the state of the record, it would not tend to prove that the notes which may have been given prior to such conservatorship proceeding, and the notes given prior to the alleged statements that King did not owe appellant anything except for one week's board, were given without consideration. That being the state of the record, this instruction, in the form in which it was given, was erroneous, as its tendency would be to mislead the jury.

Instruction Twenty-three submitted to the jury the question as to whether or not there had been proof that the notes in question were obtained by fraud and circumvention. From what we have already stated, it follows that the court erred in giving this instruction, as there is no proof to support the same.

The Thirty-fifth given instruction was loosely drawn, and its tendency was to mislead the jury. The court therefore should not have given the same.

Instruction Thirty-seven is as follows:

"The Court instructs the jury that an admission of a party to the suit against his or her interest is competent evidence to be considered by the jury in determining the issues of the case.

"And, if you believe from the evidence that the plaintiff at another time and place said she had been paid by defendant's decedent except for about a week's board and lodging--or that he owed her nothing--that is competent evidence to be considered by you upon the question as to what amount or whether or not any amount was then due the plaintiff from defendant's decedent,

she was claimed to have made out of about 10
children of King, but King did not say any
for one week's board and room rent. This being the state
of the record, it would not tend to prove that the notes
which may have been given prior to and subsequent to the
boarding, and the notes given prior to the alleged statements
that King did not owe substantial support for his wife's
board, were given without consideration. That being the state
of the record, this testimony, in my opinion, is not
given, was erroneous, as its substance would be to sustain the

Instruction three-three submitted to the jury the
question as to whether or not there had been proof that the
notes in question were obtained by fraud and circumvention.
If we have already stated, it follows that the court
error in giving this instruction, as there is no proof to

The thirty-fifth given instruction was loosely drawn,
and the jury was to mislead the jury. The court therefore
should not have given the same.

Instruction thirty-seven is as follows:
"The court instructs the jury that an admission of
guilt to the suit against his or her interest is competent
evidence to be considered by the jury in determining the issues
of the suit."
And, if you believe from the evidence that the plaintiff
at a certain time and place said she had been paid by defendant's
decedent except for about a week's board and lodging--or that
her nothing--that is competent evidence to be considered
upon the question as to what amount of whether or not
that was then due the plaintiff from defendant's decedent.

Michael King."

This instruction was erroneous, in singling out certain of the evidence. *Neville v. City of Chicago*, 191 App. 372; *Wood v. Olson*, 117 App. 123-135; *Drda v. Drda*, 298 Ill. 278-285; *Helbig v. Citizen's Insurance Company*, 234 Ill. 251-258.

Instruction Thirty-eight is erroneous, in that it leaves to the jury as to when a witness has been successfully impeached, and also in effect holds that a witness may be impeached where it has been shown that he made statements in court contradictory to statements he may have made out of court, without reference to whether or not those statements were on matters material to the issues in the case. *Chicago City Railway Company v. Ryan*, 225 Ill. 287-289; *People v. Elevins*, 251 Ill. 383-396; *Simmons v. Clement*, 164 App. 477-480; *Metzger v. Manlove*, 241 Ill. 113-116. This instruction was also erroneous in allowing the jury to disregard the testimony of the witnesses who may have made the contradictory statements, without reference to whether or not they have been corroborated by other credible evidence, or by facts and circumstances in evidence. *Simmons v. Clement*, supra.

It is contended by counsel for appellant that the sons and daughter of King were not competent witnesses on behalf of appellee. These witnesses were competent with reference to the condition of King, and they were competent as to the conversations they had with appellant, and the court did not err in so holding.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

[illegible]

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

and I think of the fact that I have
that the testimony is not correct
and in my opinion
in testimony
said that he is not
and I have heard and seen

608/14 345 I.A. 640 #4

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. ~~AUGUSTUS A. PARTLOW~~ FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 29 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

of our Lord one thousand nine hundred and twenty-seven
on Tuesday, the fifth day of April in

REMEMBERED, that afterwards, to-wit: on
the 21st of April, in the words and figures

7799

In The
APPELLATE COURT OF ILLINOIS
Second District

April Term, A. D., 1927.

C. B. SWARTZ,

vs.

BERNARD LANNEN,

and

PETER LANNEN,

Appellant,

vs.

C. B. SWARTZ,

Appellee.

Appeal from
Circuit Court,
Lee County.

OPINION by BOGGS, J.

On February 29, 1924, appellee filed an affidavit in the Circuit Court of Lee County, setting forth that one Bernard Lannen was indebted to him in the sum of \$388.25, after allowing all just credits, etc., on a judgment obtained in the Circuit Court of Ziebach County, South Dakota; that the said Bernard Lannen had departed from the State of Illinois, and that his place of residence is Dupree, South Dakota. Upon the filing of said affidavit, a writ of attachment was issued, which was levied on twenty-three head of horses in the possession and control of the said Bernard Lannen.

Thereupon appellant filed an interplea, setting forth that said horses at the time the same were attached and still are, the property of appellant, praying judgment, etc. Prior

7599

ALLEGEDLY COURT OF ILLINOIS
Second District

Page

Page

Case No. 100-100000

Appeal from
Circuit Court,
Lee County.

O. R. LAMON,
vs.
BARNARD LAMON,
and
KIRK LAMON,
Appellees,
vs.
O. R. LAMON,
Appellant.

STATE OF ILLINOIS

County of Lee

On February 29, 1924, appellee filed an affidavit in the Circuit Court of Lee County, setting forth that one Bernard Lamon was indebted to him in the sum of \$388.85, after allowing all just credits, etc., on a judgment obtained in the Circuit Court of El Paso County, South Dakota; that the said Bernard Lamon was then and there in the State of Illinois; and that his place of abode was in Lee County, Illinois. Upon the filing of said affidavit, a writ of attachment in law, which was levied on twenty-three head of horses in the possession and control of the said Bernard Lamon. Thereupon appellant filed an interpleur, setting forth that said horses at the time the same were attached and sold, the property of appellee, Bernard Lamon, and that

to the filing of said affidavit appellee filed a petition in said court, setting forth that Bernard Lannen had, prior to the suing out of said attachment, advertised said horses for sale at public auction, and setting forth that said horses were not of great value, and that on account of the expense of keeping said horses pending the litigation between appellee and appellant, it would be for the best interests of both appellee and appellant that said horses be sold by the sheriff at the time and place at which they had been so advertised. On hearing the court granted said petition and ordered said horses to be sold and the proceeds of the sale thereof to be held subject to the order of the Court.

No formal issue was joined on said interplea, but the record discloses that a jury was waived by said parties and a hearing was had on said plea before said court as though the same had been traversed. A finding and judgment was rendered in favor of appellee, and it was ordered by the court that the proceeds of the sale of said horses, less the expenses thereon, be paid over by said Sheriff to appellee on his claim. To reverse said judgment, this appeal is prosecuted.

The main ground urged by appellant for a reversal of said judgment is that the finding and judgment of said court is against the manifest weight of the evidence.

The undisputed evidence discloses that appellee recovered a judgment in the circuit court of Ziebach County, South Dakota, against Bernard Lannen on December 23, 1923; that on February 28, 1924, and for a short time prior thereto Bernard Lannen was in the possession and control of the horses in question which he advertised for sale by publication in a local newspaper and by posting notices thereof in various places throughout that community; that said horses were levied

on and sold as above set forth for \$398.00, which amount, less the expenses incident thereto, was being held by the Sheriff subject to the order of the court.

In support of his interplea, appellant offered in evidence the depositions of himself, his brother Bernard Lannen and one August Bakeburg, Sheriff of Ziebach County, South Dakota, together with certain documentary evidence. The testimony of appellant and his brother, Bernard Lannen, was to the effect that the possession and control of the horses in question was prior to said attachment proceedings in appellant in Ziebach County, South Dakota; that after having said horses inspected as provided by statute, they were shipped by appellant in his own name, and consigned to himself at Rochelle, Illinois; that Bernard Lannen had no interest whatever in said horses, except to advertise and sell them for appellant. The documentary evidence offered by appellant consisted of said certificate of inspection, and the contract or bill of lading issued to appellant by the Chicago, Milwaukee and St. Paul Railway Company for the shipment of said horses.

Both appellant and appellee were asked the direct question as to who was the owner of said horses. This question was objected to and the objection was sustained by the court. However, questions were asked both appellant and Bernard Lannen and answers were made thereto without objection, which clearly discloses that appellant was in fact the owner of said horses, and that Bernard Lannen had no interest in them whatever, except to make sale of them for appellant, his brother, as above stated.

The only evidence offered by appellee was to the effect that Bernard Lannen was in the possession of said horses and that he advertised the same for sale in his own name. On cross examination, Bernard Lannen was asked with reference to previous

on and sell as above set forth for \$500.00, which amount
said the appellant received, and that said appellant
thereby complied with the order of the court.

In support of his interpleader, appellant offered
in evidence the declarations of himself, his brother Bernard
Lannen and one Ernest Bakkeburg, Sheriff of Lincoln County,
North Dakota, together with certain documentary evidence.
The testimony of appellant and his brother, Bernard Lannen,
was to the effect that the possession and control of the
horses in question was prior to said attachment proceeding
is appellant in Lincoln County, North Dakota; that after
having said horses impounded as provided by statute, they
were shipped by appellant in his own name, and consigned to
Messrs. St. Rochelle, Illinois; that Bernard Lannen had no interest
whatever in said horses, except to advertise and sell them for
appellant. The documentary evidence offered by appellant con-
sisted of said certificate of impoundment, and the contract of
sale of said horses to appellant by the Chicago, Milwaukee
and St. Paul Railway Company for the shipment of said horses.
The evidence in support of appellant was that the
question as to who was the owner of said horses, and whether
they were sold to appellant or not, was a matter for the
court to decide. Appellant was not a party to the
impoundment of said horses, and was not a party to the
sale of said horses. Appellant was in fact the owner of said horses,
and that Bernard Lannen had no interest in them whatever, except
to make sale of them for appellant, his brother, as above stated.
The only evidence offered in support of appellant was in the form
of a declaration of himself, his brother Bernard Lannen and
one Ernest Bakkeburg, Sheriff of Lincoln County, North Dakota,
to the effect that the same for sale in his own name. On cross
examination, Ernest Lannen was asked the following questions:

sales of horses that he had made during the spring or fall of the years 1923 and 1924, and as to whether or not those horses had also been inspected and shipped by appellant Peter Lannen in the same way that the horses in question had been inspected and shipped, and he answered "Yes". He was also asked: "Q. Is it not true that you employed the auctioneer to sell said horses; that they sold in your name, and that the name of Peter Lannen was not known or spoken at any time during the sale of said horses? "A. It was spoken of, he announced it before the sale. I was there to sell the horses for my brother."

This witness also stated in answer to a question propounded by counsel for appellee, that after paying the expenses incident to the sale of the horses that were sold prior to those here in question, that he turned the ^a balance over.

The inquiry on cross examination as to the previous handling of horses by Bernard Lannen for appellant was probably not cross examination. The inquiry being a collateral one so far as this transaction is concerned, appellee is bound by the answer of the witness as to how the former transactions were handled. If proper to consider here this evidence tends to show that the horses belonged to appellant, and that Bernard Lannen had nothing whatever to do with them except to sell them and remit to appellant the proceeds of the sale, after payment of the expenses. In substance, we have stated the evidence in the case.

The question raised on the record by the assignment of errors is as to whether the court erred in ordering the proceeds of the sale of said horses paid over to appellee as such attaching creditor.

The evidence clearly discloses that, as between appellant and Bernard Lannen, the horses in question were

appellants. The record also discloses that the claim of appellee against Bernard Lannen, for which judgment had been rendered in his favor on December 23, 1923, accrued long prior to the time when the possession and control of said horses was placed in Bernard Lannen by his brother for the purpose of making sale thereof. It therefore follows that appellee does not stand in relation to said horses as an innocent purchaser. Schweitzer v. Tracy, 76 Ill. 345-352; LaSalle Brick Co. v. Coe, 65 App. 619-622.

Neither was appellee led to give credit to Bernard Lannen on account of appellant having allowed Bernard Lannen to have possession of said horses and to advertise the same for sale in his own name. The question then arises as to whether a creditor whose claim accrued long prior to the naked possession of property by a judgment debtor, the right to said property or its proceeds in an attachment proceeding as against the true owner.

"It is a well settled principle, that an attaching creditor can acquire through his attachment, no higher or better rights in the property or assets attached than the debtor had when the attachment took place, unless he can show some fraud or collusion by which his rights are impaired." Smith v. Agnew, 80 Ill. 553-555; Drake on Attachments, Sec. 220. An attaching or judgment creditor does not stand in the position of an innocent purchaser, as he parts with nothing in exchange for the property and does not take it in satisfaction of his debt. He takes no greater interest or better title than his debtor has. Sweitzer v. Tracy, supra, 352; La Salle Brick Co. v. Coe, supra, 622; Anheuser-Busch Brewing Co. v. Kickham, 119 App. 58.

appellants. The record also discloses that the title of
appellants against Bernard Lammner, the title interest had been
registered in his favor on December 23, 1928, secured from prior
to the time when the possession and control of said horses was

placed in Bernard Lammner by his brother for the purpose of
selling said horses. It therefore follows that appellants
did not act in relation to said horses as an innocent purchaser.

Switzer v. Tracy, 76 Ill. 245-262; Switzer v. Tracy, 76 Ill. 245-262; Switzer v. Tracy, 76 Ill. 245-262.

Neither was appellee led to give credit to Bernard
Lammner on account of appellant having allowed Bernard Lammner
to have possession of said horses and to advertise the same
for sale in his own name.

Appellant's brother whose claim accrues from prior to the
actual possession of property by appellant brother, the right
to sell property or its proceeds in an attachment proceeding
as against the true owner.

Appellants well settled principle, that an attaching
creditor can acquire through his attachment, no higher or
better rights in the property or assets attached than the
debtor had when the attachment took place, unless he can show
some fraud or collusion by which his rights are impaired.
Switzer v. Arnew, 80 Ill. 552-555; Switzer v. Arnew, 80 Ill. 552-555.

Appellant on judgment creditor does not stand in the
position of an innocent purchaser, as he parties with nothing
to the sale for the property and does not take it in satisfaction
of his debt. He takes no greater interest or better

Switzer v. Tracy, 76 Ill. 245-262; Switzer v. Tracy, 76 Ill. 245-262; Switzer v. Tracy, 76 Ill. 245-262.

Switzer v. Tracy, 76 Ill. 245-262; Switzer v. Tracy, 76 Ill. 245-262; Switzer v. Tracy, 76 Ill. 245-262.

The Court in the latter case, in discussing a question of this character at page 59 says: "Appellees relied, however, upon the fact that appellant placed the bar fixtures in the possession of Diehl and permitted him to ~~sue~~^{use} them, without anything to indicate to the public that they were not his property, as being sufficient to establish the right of appellees to levy upon the same and sell them to pay Diehl's indebtedness. They rely upon the well-established principle approved in the case of Williams v. Fletcher, 129 Ill. 356, that, 'Where the true owner holds out another, or allows him to appear, as the owner of or as having full power of disposition over the property and innocent third parties are thus led into dealing with such apparent owner, they will be protected.' But in this case there was no proof whatever that innocent third parties were led into dealing with Diehl under the belief that he was the owner of the fixtures in question. When appellant made out his prima facie case by showing that it was in fact the true owner of the bar fixtures in question, although Diehl was in possession of them, appellees, in order to maintain their defense, were called upon to show some reason why, notwithstanding that fact, appellant should be estopped in law from asserting it against the creditors of Diehl. This they failed to do, and as the proofs in the record show that appellant was the owner of the property in question at the time it sued out the writ of replevin and as no reason was shown why it should be estopped from asserting its title as against the attaching creditors, the judgment of the court below must be reversed."

We are of the opinion and hold that the finding and judgment of the trial court was against the manifest weight of the evidence, and as, under our holding there can be no

The Court in the latter case, in discussing a question of this character at page 32 says: "It will be noted, however, upon the fact that appellant placed the bar fixtures in the possession of Diehl and permitted him to use them, without anything to indicate to the public that they were not his property, as being sufficient to establish the right of appeal- less to have upon the same and will then to pay Diehl's indebtedness. They rely upon the well-established principle approved in the case of Williams v. Fletcher, 122 Ill. 412, that, 'where the true owner holds out another, or allows him to appear, as the owner of or as having full power of disposition over the property and innocent third parties are thus led into dealing with such apparent owner, they will be protected.' But in this case there was no proof whatever that innocent third parties were led into dealing with Diehl under the belief that he was the owner of the fixtures in question. When appellant made out his prima facie case by showing that it was in fact the true owner of the bar fixtures in question, although Diehl was in possession of them, appellees, in order to maintain their defense, were called upon to show some reason why, notwithstanding that fact, appellant should be estopped in law from asserting it against the creditors of Diehl. This they failed to do, and as the proofs in the record show that appellant was the owner of the property in question at the time it was put out for sale of reprieve and as no reason was shown why it should be estopped from asserting its title as against the attaching creditors, the judgment of the court below must be reversed."

We are of the opinion and hold that the finding and judgment of the trial court was against the manifest weight of the evidence, and as such will be reversed.

recovery by appellee, the judgment is reversed and judgment is entered in this court in favor of appellant for the proceeds of the sale of said horses and the sheriff of Lee County is ordered to pay to appellant the gross proceeds of such sale. Reversed with finding of facts judgment here.

We find as the ultimate facts in this case that the horses in question were the property of appellant at the time said attachment writ was levied and that Bernard Lannen had no right, title or interest therein except as agent of appellant; we further find that there was no fraud connected with the transaction, and that the claim of appellee accrued long prior to the possession of said horses by Bernard Lannen, and that as against appellant, appellee was not warranted in levying said attachment.

Reversed, with finding of fact.

recovery by appellee, the judgment is reversed and judgment is entered in this case in favor of appellant for the proceeds of the sale of said horses and the benefit of the County is ordered to pay to appellant the gross proceeds of such sale. Reversed with finding of facts, judgment nisi.

It is that as the ultimate facts in this case show the horses in question were the property of appellant at the time said attachment was levied and that appellant owned and no right, title or interest therein except as agent of appellant; we further find that there was no fraud connected with the transaction, and that the claim of appellee against him prior to the possession of said horses by appellee, appellant, and that as against appellant, appellee was not wronged in levying said attachment.

Reversed, with finding of facts.

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order of the court.

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of

the property of
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STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

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60822 245 I.A. 640 #5
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

FRANKLIN H. BOGGS
Hon. ~~AUGUSTUS A. PARTLOW~~, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
• SEP 29 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

AT A TERM

of our Lord and Chancery and Sheriff of the County of
for the Second District of the State of Illinois
this 1st day of May 1881

Witness my hand

JOS. L. JOHNSON, Clerk

(J. L. JOHNSON, Sheriff)

1881, so with
Signed

in the words and

The People of the State of Illinois,	:	
Defendant in Error,	:	
	:	Writ of error
v.	:	to County Court
	:	of Lake County.
Charles Dukas and Chappie Tyrell,	:	
Plaintiffs in Error.	:	

Jones J:

The information in this cause, as amended, consists of six counts based on section 127 of the Criminal Code. The first and second counts charged the defendants with keeping a common gambling house on April 24th and January 20th, 1926, respectively. The third and fourth counts charged the possession of tables and other apparatus on the same dates for the purpose of playing at a game for money. The defendants were found guilty under the first four counts. The judgment of the court was that plaintiff in error, Dukas, pay a fine of \$300 on the first count, \$300 on the second count, ^{\$200 on the} \$200 on ^{third count and} the fourth count, making a total of \$1000; and that plaintiff in error Tyrell pay a fine of \$450 on the first count, \$450 on the second count, \$300 on the third count and \$300 on the fourth count, making a total of \$1500.

The record shows that plaintiffs in error conducted a gambling house on the second floor of a building located on a prominent street in the city of Waukegan. It had been in operation for at least five or six months previous to the filing of the information in this cause. Neither of plaintiffs in error testified.

The first ground urged for reversal is that plaintiff in error, Dukas, had already been placed in jeopardy for the same offense. On February 18th, 1926, he was arrested with three other men and taken before a justice of the peace, where he entered a plea of guilty to "an offense", paying a fine of

Writ of error
to County Court
of Lake County.

The People of the State of Illinois
v.
Charles Dukes and George Tyrell,
Plaintiffs in Error.

James T.

The information in this cause, as amended, consists of six counts based on section 12V of the Criminal Code. The first and second counts charged the defendants with keeping a common gambling house on April 24th and January 20th, 1926, respectively. The third and fourth counts charged the possession of tables and other apparatus on the same dates for the purpose of playing at a game for money. The defendants were found guilty under the first four counts. The judgment of the court was that plaintiff in error, Dukes, pay a fine of \$100 on the first count, \$300 on the second count, \$200 on the third count, making a total of \$600; and that plaintiff in error Tyrell pay a fine of \$450 on the first count, \$450 on the second count, \$300 on the third count and \$200 on the fourth count, making a total of \$1500.

The record shows that plaintiff in error conducted a gambling house on the second floor of a building located on a vacant street in the city of Waukegan. It had been in operation for at least five or six months previous to the filing of the information in this cause. Neither of plaintiffs in error testified.

The first ground urged for reversal is that plaintiff in error, Dukes, had already been placed in jeopardy for the same offense. On February 18th, 1926, he was arrested with three other men and taken before a justice of the peace, where he entered a plea of guilty to "an offense", paying a fine of

\$50 and costs and also paying the fine and costs of the other three men. Neither the justice of the peace nor his docket was produced before the court, but it was sought to make the proof orally that the offense to which he had pleaded guilty was the same offense as charged in this case. None of the evidence so offered was competent and the court committed no error in refusing to admit it. While parol evidence is admissible in showing the identity of offenses charged, as in *People v. Brady*, 272 Ill. 401, it must be explanatory of the record evidence of the charges contained in the indictment or information, and of the conviction or acquittal of the defendant.

At the beginning of the trial, counsel for plaintiffs in error moved to limit the testimony to dates subsequent to February 19, 1926, and stated that he would prove by a competent witness that Dukas was arrested on February 19th, and paid a fine to the justice in his court on a charge of gambling. The offense of gambling is not charged in the information in this case. The information makes charges of other and different offenses. To be a bar, the offense charged in the former prosecution must agree in law and in fact with some offense of which the defendant may be convicted in the present prosecution; and in such former prosecution there must have been an acquittal or conviction. (*Freeland v. People* 16 Ill. 380; *Campbell v. People* 109 id. 565; *Spears v. People* 220 id. 72.) In this state of the record there was no showing of former jeopardy.

The following instruction was offered by plaintiff in error: "The court instructs you that the statute of the State of Illinois provides that no person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same, as a party or otherwise ,

and costs and also paying the fine and costs of the other three men. Neither the justice of the peace nor his docket was produced before the court, but it was sought to make the proof orally that the offense to which he had pleaded guilty was the same offense as charged in this case. None of the evidence so offered was competent and the court committed no error in refusing to admit it. While parol evidence is admissible in showing the identity of offenses charged, as in *People v. Brady*, 232 Ill. 401, it must be explanatory of the record evidence of the charges contained in the indictment or information, and of the conviction or admission of the defendant. The rule is stated in *People v. Brady*, 232 Ill. 401, 1920, and stated that he would prove by a competent witness that Dukes was arrested on February 19th, and held a trial to the justice in his court on a charge of gambling. The offense of gambling is not charged in the information in this case. The information makes charges of other and different offenses. To be a bar, the offense charged in the former prosecution must agree in law and in fact with some offense of which the defendant may be convicted in the present prosecution; and in such former prosecution there must have been an admission or conviction. (*People v. Brady*, 232 Ill. 401, 1920; *Gampbell v. People*, 109 Ill. 555; *Spears v. People*, 280 Ill. 72.) In this state of the record there was no showing of former jeopardy. The following instruction was offered by plaintiff in error: "The court instructs you that the state of the State of Illinois provides that no person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same, as a party or otherwise."

or by reason of his having been convicted of any crime, but such interest or conviction may be shown for the purpose of effecting his credibility; provided, however, that the defendant in any criminal case, or proceeding, shall only at his own request be deemed a competent witness and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect." The court modified this instruction by striking out the proviso after the word "credibility". It is insisted that such modification is reversible error. The instruction as offered was a statement of the rule laid down by the statute and we see no reason for the modification. The question then arises whether the error requires a reversal of the judgment. Plaintiffs in error rely upon *Farrell v. People*, 133 Ill. 244 in support of their contention. In that case two defendants were jointly indicted, tried and convicted. One of them testified on the trial and the other did not. The one who did not testify asked an instruction to the effect that no presumption of guilt should be indulged against him because he had not testified, but the instruction was refused. The Supreme Court held the instruction should have been given; that giving it became doubly important because the court gave an instruction for the prosecution as to the weight of the evidence to be given to the testimony of his co-defendant, thereby directing the jury's attention to the statute making defendants in criminal cases competent to testify in their own behalf. The cause was reversed for that error and also because of prejudicial arguments of counsel for the prosecution. In the present case the situation is quite different as neither defendant testified.

While the instruction should have been given as requested, nevertheless, it is a well settled rule in this state,

or by reason of his having been convicted of any crime, but
such instruction is a violation of the purpose of
effecting his conviction; provided, however, that the
instruction is not given in any criminal case, or proceeding, shall only if
it can be shown to be a competent witness and his neglect
to testify shall not create any presumption against him, nor
shall the court be required to comment on the failure of
or upon any neglect. It is modified this instruction by
striking out the words "and after the word 'and'". It is
modified this instruction is reversible error. The in-
struction as given was a statement of the rule laid down by
the statute and was not a reason for the modification. The
question then arises whether the error requires a reversal of
the judgment. It is held in error rely upon *People v. People*,
100 Ill. 2d in support of their contention. In that case two
defendants were jointly indicted, tried and convicted. One of
them testified on the trial and the other did not. The one who
did not testify asked an instruction to the effect that no pre-
sumption of guilt should be indulged against him because he had
not testified, but the instruction was refused. The Supreme
Court held the instruction should have been given; that giving
it became doubly important because the court gave an instruction
for the prosecution as to the weight of the evidence to be given
to the testimony of his co-defendant, thereby directing the
jury's attention to the statute making defendants in criminal
cases competent to testify in their own behalf. The case was
reversed for that error and also because of prejudicial arguments
of counsel for the prosecution. In the present case the situation
is quite different as neither defendant testified.
While the instruction should have been given as re-
quired, nevertheless, it is a well settled rule in this state,

that the giving and refusing of instructions will generally afford no ground for reversal in a criminal case where the guilt of the accused was so clearly and conclusively established by competent evidence that the jury could not reasonably have arrived at any other verdict, than one of guilty. This rule is fully set forth in *People v. Michael*, 280 Ill. 11.

No error was committed by striking out the word "mere" from plaintiffs in error's 10th instruction, which, as offered, stated that the information is a mere written accusation, etc. The substance of other modified instructions was covered by given instructions. Therefore, the modifications were properly made. (*People v. Wallace* 279 Ill. 139, (147); *People v. Makovicki*, 316 id. 407.)

No motion for a new trial is preserved in the bill of exceptions, although it appears in the transcript of the record. It must be preserved in the bill of exceptions, and when not so preserved, the reviewing court will not consider an assignment of error based on the refusal to grant a new trial. (*Graham v. People* 15 Ill. 566; *Harris v. People* 130 id. 457.) In such case the cause will not be reviewed in the Appellate Court, (*James v. Dexter* 113 Ill. 654 (657).)

It is urged that the fines are excessive. They were within the provisions of the statute. The state may join misdemeanors of the same character in the same information or indictment, and the court may fix separate punishments upon each count on which there is a conviction, but in determining whether the punishment is proportionate to the nature of the offense, each count must be considered by itself, as the constitutional provision does not apply to the aggregate of the punishments inflicted for each offense. (*People v. Elliott* 272 Ill. 592.) We find no reversible error in the record and the judgment of the county court is affirmed.

Judgment affirmed.

that the giving and retaining of instructions will generally affect no ground for reversal in a criminal case. The bill of the state was so stated, and it is accordingly stated by competent evidence that the jury could not reasonably have arrived at any other verdict than one of guilty. This rule is fully set forth in People v. Michael, 280 Ill. 11. No error was committed by instructing the jury as above.

"There is no objection to the instruction given." It is as if, stated, stated that the instruction was given as directed, etc. The substance of other modified instructions was covered by given instructions. Therefore, the modification does not constitute error. (People v. Wallace, 279 Ill. 180.)

(People v. Michael, 280 Ill. 11; People v. Michael, 280 Ill. 11.)

No motion for a new trial is preserved in the bill of exceptions, although it appears in the transcript of the record. It must be preserved in the bill of exceptions, and when not so preserved, the reviewing court will not consider an assignment of error based on the refusal to grant a new trial.

(People v. Harris, 15 Ill. 565; Harris v. People 150 Ill. 457.)

In such cases the cause will not be reviewed in the appellate court. (James v. Dexter 115 Ill. 654 (1877).)

It is urged that the fines are excessive. They were within the provisions of the statute. The state may take advantage of the same character in the same information or indictment, and the court may fix separate punishments upon each count on which there is a conviction, but in determining whether the punishment is proportionate to the nature of the offense, each count must be considered by itself, as the constitutional provision does not apply to the aggregate of the punishments inflicted for each offense. (People v. Elliott, 278 Ill. 528.) We find no reversible error in the record and the judgment of the state court is affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

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AT A TERM OF THE APPELLATE COURT,

245 I.A. 641 #1

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS
~~AUGUSTUS A. PARTLOW~~ Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

29 1927 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

NO 1510-03 observed by 600

The People of the State of Illinois,	:	
	:	
Defendant in Error,	:	
	:	
v.	:	Writ of Error
	:	to the Circuit Court
	:	of Winnebago County.
	:	
Ros Chiarelli,	:	
	:	
Plaintiff in Error,	:	

Jones J:

Plaintiff in error was tried in the circuit court of Winnebago County on an indictment consisting of three counts; the first charged the possession of intoxicating liquor; the second charged the possession of a still; and the third charged the manufacture of intoxicating liquor. A jury found him guilty on all three counts. He was sentenced to pay a fine of \$500 under the first count and a like amount under the third count and also to be imprisoned in the county jail for a period of 120 days under the third count. No judgment was entered as to the second count.

The conviction in this case rests altogether upon circumstantial evidence. On the night of August 16th, 1925, at about 9:30 o'clock P. M., a fire occurred in the barn or garage located on the rear or west end of the premises known as 1213 South West Street in the City of Rockford. On the front or east end of the lot there is a two story flat. A short distance west of the flat there is another small house of six rooms which at the time of the fire was occupied by a colored man and wife, named McGee. The barn is located about 15 to 20 feet west of the McGee house, the whole premises being 56 feet long and 32 feet wide. The McGee house was numbered 1215 and he paid \$25 a month rent, including gas and water.

Writ of Error
to the Circuit Court
of Winnebago County.

The People of the State of Illinois,
Defendant in Error,
v.
Plaintiff in Error.

James J.

Plaintiff in error was tried in the circuit court of Winnebago County on an indictment consisting of three counts; the first charged the possession of intoxicating liquor; the second charged the possession of a still; and the third charged the manufacture of intoxicating liquor. A jury found him guilty on all three counts. He was sentenced to pay a fine of \$500 under the first count and a like amount under the third count and also to be imprisoned in the county jail for a period of 120 days under the third count. No judgment was entered as to the second count.

The conviction in this case rests altogether upon circumstantial evidence. On the night of August 16th, 1925, at about 9:30 o'clock P. M., a fire occurred in the barn or garage located on the rear or west end of the premises known as 1212 South West Street in the City of Rockford. On the front or east end of the lot there is a two story flat. A short distance west of the flat there is another small house of six rooms which at the time of the fire was occupied by a colored man and wife, named McGee. The barn is located about 15 to 20 feet west of the McGee house, the whole premises being 56 feet long and 32 feet wide. The McGee house was numbered 1215 and he paid \$25 a month rent, including gas and water.

It appears that these premises were held by the wife of plaintiff in error under a contract for deed, dated August 11, 1922, the purchase price being payable in installments. The contract was placed in a bank and the payments, or at least a large part of them except the first one were made by plaintiff in error at the bank by means of checks signed by him.

McGee was a minister and moved into the small house on September 21, 1924, occupying it continuously until January 24, 1926, when he moved to the first floor of the flat building. No one thereafter lived in the small house. Plaintiff in error and his family moved into the upper flat and lived there continuously to the time of the trial. Previous to the time McGee moved in to the flat building, it had been occupied for several years by a man named Goodloe. Goodloe sometimes paid his rent to plaintiff in error and at other times to his wife or child. Neither McGee nor Goodloe had anything to do with the barn.

The gas for the small house was metered by a regular credit meter in the basement and the bills paid for gas used through this meter from October, 1923, until after the fire averaged about \$20 a month. Whatever gas was used in the barn was registered on this meter. In the barn where the fire occurred, a gas pipe came into the lower story and connected with a gas plate. There was a large stove or heater in the loft of the barn and another stove sitting downstairs. When the fire was extinguished, seventeen barrels of mash, a still and a five gallon jug of moonshine whiskey were found in the barn. The bull dog was found dead in the lower part of the barn lying in a pool of water.

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It appears that these premises were held by the wife of plaintiff in error under a contract for deed, dated August 11, 1932, the purchase price being payable in installments. The contract was placed in a bank and the payments, or so it is a large part of them except the first one were made by plaintiff in error at the bank by means of checks signed by him.

Mogee was a minister and moved into the small house on September 21, 1934, occupying it continuously until January 21, 1935, when he moved to the first floor of the building. He was thereafter lived in the first floor of the building in error and his family moved into the upper flat and lived there continuously to the time of the trial. Previous to the time Mogee moved in to the first building, it had been occupied for several years by a man named Goodloe. Goodloe had paid his rent to plaintiff in error and at other times to his wife or child. Neither Mogee nor Goodloe had any right in the premises.

The gas for the small house was metered by a regular credit meter in the basement and the bills paid for gas were through this meter from October, 1933, until after the fire averaged about \$20.00 a month. The meter was not in the barn was registered in this meter. In the barn where the fire occurred, a gas pipe came into the lower story and connected with a gas plate. There was a large stove or heater in the loft of the barn and seven barrels of molasses on the fire was extinguished. Seven barrels of molasses and a five gallon jug of moonshine whiskey were found in the barn. The bull dog was found dead in the lower part of the barn lying in a pool of water.

Plaintiff in error testified that he had never been in the small house, nor in the barn, previous to the fire. He operated two automobiles which were usually left in the open spaces in the yard when not in use. He testified that he was a grocery merchant, going to Wisconsin for cheese and to Chicago for other supplies which he delivered to his customers; that on the day before the fire he took his family to Wisconsin, returning in the afternoon after the fire, and that before going he left his keys with a neighbor requesting him to look after his house and dog. The neighbor testified that the dog was chained to a tree in the yard, and that he fed it at about four o'clock on the day of the fire, and that he did not see it again until after the fire, when it was found dead. He and another witness testified to having seen a five gallon can in the alley close to the barn after the fire. One of them said it smelled of gasoline.

Plaintiff in error testified that his wife rented the small house to Gaziano who afterwards went to the old country, and that he didn't know any more about it; that the house was rented about four or five years ago, and some two or three years before the fire; that a fellow by the name of Juliano moved in about six months after he (plaintiff in error) bought his house and moved in; and that about eight days after Juliano moved out, Louis Gaziano moved in, paying \$25 a month for the house and \$5 for the barn. He also testified that Gaziano owed two months' rent and that about a week before the fire he notified him to move out so the barn could be enlarged for more cars. The account of the gas company for gas through the meter at the small house was first kept in the name of Luigi Juliano and on December 30, 1924 was changed to the name of Luigi Gaziano.

The plaintiff in error testified that he had never been in the small house, nor in the barn, previous to the fire. He operated two automobiles which were usually kept in the open spaces in the yard when not in use. He testified that he was a grocery merchant, going to Wisconsin for cheese and for Chicago for other supplies which he delivered to his customers; that on the day before the fire he took his family to Wisconsin returning in the afternoon after the fire, and that before going he left his keys with a neighbor requesting him to look after his house and dog. The neighbor testified that the dog was chained to a tree in the yard, and that he fed it at about four o'clock on the day of the fire, and that he did not see it again until after the fire, when it was found dead. He and another witness testified to having seen a live cat in the alley close to the barn after the fire. One of the witnesses testified that the cat was white with black spots. The plaintiff in error testified that he did not recall the small house to be a house which was in the alley, and that he didn't know any more about it. That the house was rented about four or five years ago, and was in the name of Julius years before the fire; that a fellow by the name of Julius moved in about six months after he (plaintiff in error) bought his house and moved in; and that about eight days after Julius moved in, Julius testified that he, Julius, had a woman in the house and for the barn. He also testified that Julius had two months' rent and that about a week before the fire he called him to move out so the barn could be enlarged for more cars. The account of the gas company for gas through the meter at the small house was first kept in the name of Julius Williams and on December 30, 1924 was changed to the name of Julius Williams.

Exhibit 6 is an application dated "1/7/25" for a gas meter to be set at 1215 South West Street. The application bears the signature "Luigi Gaziano" and states that it is to be placed in a building "occupied as a res.". The testimony shows that the abbreviation "res." means residence. The application discloses that the meter was set on the date the account was changed to the name of Luigi Gaziano. McGee was then living there and had been ever since September 1, 1924. Lewis Vannoy, who had lived in the two story flat with the Goodloes for about five years, testified that colored people lived in the small house previous to the time McGee moved there; that if any white people lived there before the colored people, he did not know anything about it; that he never heard of Luigi Juliano; and that no man named Luigi Gaziano lived there. Two of the neighbors of plaintiff in error testified in his behalf, but neither of them testified that Juliano or Gaziano ever lived in the small house or had been seen around the barn. One of them had lived, since 1918, on the next street back of the alley along the barn.

Plaintiff in error denied that he knew anything about any still in the barn at any time; or anything about any liquor, mash or jugs there. He testified he had never had any conversations with Gaziano pertaining thereto and that he did not sign Exhibit 6 and know nothing about it. He claims that Gaziano moved out of the small house but retained possession of the barn. The McGees had lived there almost a year before the fire and Mrs. McGee testified she had never seen any strangers about the building.

It is the contention of plaintiff in error that there is no evidence showing he was in possession of any other part of the premises than that actually occupied by him, and that the record positively shows the barn was in the

possession of some one else. But the testimony of plaintiff in error that he had bought the house; that he left it and his dog in charge of a neighbor when he went to Wisconsin the day before the fire; that he paid the installments on the purchase price of the premises; and that he ordered Gaziano to move out because of failure to pay rent and because he desired to enlarge the barn for more cars, strongly tends to show that he had possession and control of the premises. He infers there had been trouble between him and Gaziano and that Gaziano had placed the still, mash and the dog in the barn and set fire to it, but this claim finds no corroboration in the evidence.

Guilt of a defendant charged with a criminal offense may be proved by circumstantial evidence if the circumstances proved are sufficient to produce a moral certainty of guilt beyond a reasonable doubt. (People v. Delorenzo 300 Ill. 124.) It is inconceivable that he would pay a gas bill of \$20 a month for the small house which rented for \$25 a month, without knowing for what the gas was being used. No other witness testified to ever having seen anybody named Gaziano or Julianio around the premises. Under all the circumstances proven, we are unable to say that the evidence is not sufficient to show the defendant's guilt beyond a reasonable doubt. A judgment of conviction will not be reversed merely because the testimony is conflicting, but will only be reversed where the evidence is so unreasonable, improbable or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. (People v. Thompson 321 Ill. 594.)

Complaint is made of the 1st, 2nd, and 3rd instructions given on behalf of the prosecution because they contain no express reference to the lack of a permit from the Attorney General as charged in the indictment. The same point was

possession of some one else. But the testimony of plaintiff in error that he had never seen the dog; that he had never seen his dog in charge of a neighbor; that he had never seen the dog before the fire; that he paid the installments on the premises; and that he ordered gasoline to have it because otherwise to pay rent and because he desired to enlarge the barn for more cars, strongly tends to show that he had possession and control of the premises. The parties have had been trouble between him and Gasline and the Gasline had placed the still, man and the dog in the barn and set fire to it, but this claim finds no corroborative evidence.

Guilty of a defendant charged with a criminal offense may be proved by circumstantial evidence if the circumstances prove sufficient to produce a moral certainty of guilt beyond a reasonable doubt. (People v. De Lorenzo, 300 Ill. 124.) It is inadvisable that he would pay a gas bill of \$20 a month for the small house which rented for \$25 a month without knowing for what the gas was being used. No other witness testified to ever having seen anybody named Gasline or Gasline around the premises. Under all the circumstances proved, we are unable to say that the evidence is not sufficient to show the defendant's guilt beyond a reasonable doubt. A finding of conviction will not be reversed merely because the testimony is conflicting, but will only be reversed where the evidence is so unreasonable, improbable or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. (People v. Thompson, 321 Ill. 294.)

Plaintiff is made of the fact, and the fact is that on behalf of the prosecution because they contain no express reference to the fact of a permit from the Attorney General as charged in the indictment. The same point was

raised in *Christie v. People*, 206 Ill. 337, viz, that the instructions there complained of referred the jury to the indictment without containing in themselves the hypothesis of facts necessary to be proved to establish the defendant's guilt. It was held that an instruction authorizing the jury to find the accused guilty if they believe from the evidence beyond a reasonable doubt that he committed the crime, as charged in the indictment, is not erroneous where the indictment states all the facts necessary to a conviction. The indictment in this cause does state in each count referred to the facts necessary to a conviction. The instructions come within the rule and there was no error in giving them. The case of *People v. Tate*, 316 Ill. 52 cited by plaintiff in error is not in point. In that case the offense mentioned in the instruction condemned was different from the one charged in this indictment.

Plaintiff in error also complains of the 4th, 6th, 7th, and 10th instructions given on behalf of the People. The 4th instruction has been frequently approved by the Supreme Court. (*People v. Zajicek* 233 Ill. 199.) An instruction in almost the same language as the 6th instruction was upheld in *People v. Cassin* 322 Ill. 276. The 7th instruction is in the language of the statute. The principal objection urged to these instructions is that they had no application to the facts in the case. While the practice of giving instructions consisting of abstract propositions of law not applicable to the evidence, even though not misleading, is not to be commended, yet we are unable to say that the giving of these instructions tended to confuse or mislead the jury or to prejudice the rights of plaintiff in error. In *Watt v. People* 126 Ill. 9 and in *Spies v. People* 122 Ill. 1, instructions similar to the 10th instruction given for the prosecution were approved.

raised in *Christie v. People*, 233 Ill. 327, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

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Finding no reversible error in the record, the judgment of the circuit court is affirmed.

Judgment affirmed.

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STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS I. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

6084a

AT A TERM OF THE APPELLATE COURT,

245 I.A. 641^{#2}

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 29 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

the fifth day of

the month of

the State of

Presiding in

Hon. NORMAN J. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. LARK, Sheriff.

In Re Estate of Mary E. Brown,
deceased, Albert J. Selleck,
Administrator, Appellant,

v.

Eugene A. Whitney, Appellee.

Appeal from the
Circuit Court of
Knox County.

Jones J:

Mary E. Brown died on January 8th., 1914, intestate, and left surviving her as her only heirs at law, Edith L. Hupert, her niece, and Eugene A. Whitney, her nephew. The estate consisted entirely of personal property valued at approximately \$6900. On July 16th., 1915, Edith L. Hupert, a resident of the State of California, executed the following instrument:

"I, Edith L. Hupert, a widow, of San Diego, County of San Diego, State of California for and in consideration of Love and Affection and other valuable consideration, do hereby grant to Guy C. Warner of the same place, all that real property situated in the City of San Diego, County of San Diego, State of California, bounded and described as follows: (Description), also all personal property of every kind and description whatsoever and wheresoever situate of which I am the lawful owner or possessor to have and to hold the above granted and described premises unto the said grantee and his heirs and assigns forever."

Mrs. Hupert died in November of the same year and the instrument was recorded in California the day following her death.

Appellant, Albert J. Selleck, as administrator of the estate of Mary E. Brown, deceased, filed his report in the county court showing a disbursement of \$2204.06 to Whitney and a like disbursement to Guy C. Warner, as assignee and grantee of Edith L. Hupert. Whitney objected to the payment to Warner and upon

Appeal from the
Circuit Court of
Knox County.

In Re Estate of Mary E. Brown,
deceased, Albert T. Seileck,
Administrator, Appellant,
v.
Eugene A. Whitney, Appellee.

Jones J.

Mary E. Brown died on January 8th., 1914, intestate,
and left surviving her as her only heirs at law, Edith L. Rupert,
her niece, and Eugene A. Whitney, her nephew. The estate
consisted entirely of personal property valued at approximately
\$2300. On July 18th., 1915, Edith L. Rupert, a resident of the
State of California, executed the following instrument:

"I, Edith L. Rupert, a widow, of
San Diego, County of San Diego, State of
California for and in consideration of
love and affection and other valuable
consideration, do hereby grant to Guy
C. Warner of the same place, all that
real property situated in the City of
San Diego, County of San Diego, State
of California, bounded and described
as follows: (Description), also all
personal property of every kind and
description whatsoever and wheresoever
situate of which I am the lawful owner
or possessor to have and to hold the
above granted and described premises
unto the said grantee and his heirs
and assigns forever."

Mrs. Rupert died in November of the same year and the instrument
was recorded in California and the following was filed:
Appellant, Albert T. Seileck, as administrator of the
estate of Mary E. Brown, deceased, filed his report in the county
court showing a disbursement of \$2304.00 to Whitney and a like
disbursement to Guy C. Warner, as assignee and grantee of Edith
L. Rupert. Whitney objected to the payment to Warner and upon

a hearing in the county court his objections were overruled. He then appealed to the circuit court and there his objections were sustained.

Appellee contends that Warner is not entitled to any part of the personal estate because the instrument does not show an intent to assign or convey the interest of Edith L. Hupert and does not sufficiently describe the personal property so that it can be identified. He also contends that the language used is insufficient to constitute an assignment; That no legal consideration is mentioned; and that courts will not recognize assignments of interests in decedent's estates unless made in compliance with the last paragraph of Sec. 1 of the Garnishment Act (Sec. 1, Chap. 62, Revised Statutes.)

The principal question is whether the language used in the instrument is sufficient to cover the particular chose in action in question. If it is, then the circuit court was in error in holding the assignment invalid. The question in all cases of equitable assignments is what was intended. (Steingrebe v. French Mirror & Glass Beveling Co. 83 Ill. App. 587; Mason v. Chicago Title & Trust Company 77id. 19; Glover v. Wells 40 id. 350.) It cannot be said there is any ambiguity in the language used by the assignor in the instrument in question. It is clear and distinct and embraces all personal property of every kind and description whatsoever and wheresoever situate, of which the assignor was the lawful owner or possessor. It is not denied that she was then the lawful owner of an undivided one-half interest in the assets of the estate in question, and as we view it there can be no doubt, from the language used that it was intended by both parties to include that interest in the assignment.

assignment (which) objected to the
it was intended by both parties to include that interest in the
as we view it there can be no doubt from the language used that
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of which the assigner was the lawful owner or possessor. It is
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v. Wells 40 id. 350.) It cannot be said there is any ambiguity
387; Mason v. Chicago Title & Trust Company 77 id. 19; Glover
(Steinberg v. French Mirror & Glass Beveling Co. 88 Ill. App.
all cases of equitable assignments in what was intended.
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in action in question. If it is, then the circuit court was
in the instrument is sufficient to cover the particular chose
of the principal question is whether the language used
not (303.1, Chap. 63, Revised Statutes.) and a judgment was
compliance with the last paragraph of Sec. 1 of the Garnishment
assignments of interests in decedent's estates unless made in
consideration is mentioned; and that courts will not recognize
that is insufficient to constitute an assignment; that no legal
so that it can be identified. He also contends that the language
subject and does not sufficiently describe the personal property
show an intent to assign or convey the interest of Edith L.
part of the personal estate because the instrument does not
Appellee contends that Warner is not entitled to any

were assigned. Appellant.
He then appealed to the circuit court and there his objections
a hearing in the county court his objections were overruled.

As to the sufficiency of the language to constitute an assignment, it may be said that where the assignment is in writing no special form of words or language is required, although the operative words of an assignment generally used are, "sell, assign and transfer" or "sell, assign and set over". It may even be in the form of an order on a debtor or holder of a fund assigned to pay a debt or fund to another person. Any language, however informal, if it shows the intention of the owner of the chose in action to transfer it, will be sufficient to vest the property therein in the assignee. (Colehour v. Bass 143 Ill. App. 530; 5 C. J. Sec. 73). An assignment of all estate of whatsoever nature or kind, or of all personal property whatever, will operate to pass to the assignee a chose in action of the assignor. (Sherman v. Elder 24 N. Y. 381) A chose in action may be assigned and courts of law will recognize and protect the right of the assignee, whether the assignment be good at law or in equity only. (Brassel v. Troxel 68 Ill. App. 131; Savage v. Gregg, 150 Ill. 161.) Any order, writing or act which makes an appropriation of a fund, amounts to an equitable assignment of the fund. (Mason v. Chicago Title & Trust Co., supra.) In our opinion the language of the instrument is sufficient to identify the property in question and to constitute a valid, legal assignment of the same.

Appellee also claims that it is not shown that Edith L. Hupert, who executed the assignment is the same person as Edith Hupert, who is identified in the proof of heirship, as an heir of Mary E. Brown; that the instrument in question is not authentic or genuine and that its execution was not properly proven so as to entitle it to admission in evidence. The first of these objections was not raised in the trial court. The record shows that the original instrument was admitted in evidence

As to the sufficiency of the language to constitute an assignment, it may be said that where the assignment is in writing in a special form of words or language is required, although the operative words of an assignment generally read are, "sell, assign and transfer" or "sell, assign and set over". It may even be in the form of an order or a bill of lading or a bill of exchange to pay a debt or fund to another person. Any language, however informal, if it shows the intention of the owner of the chose in action to transfer it, will be sufficient to vest the property therein in the assignee. (Guthrie v. Hays, 143 Ill. App. 330; 5 G. 2. Sec. 73). An assignment of all assets of whatever nature or kind, or of all personal property whatever, will operate to pass to the assignee a chose in action of the assignor. (Harrison v. Rider 24 N. Y. 381) A chose in action may be assigned and courts of law will recognize and protect the right of the assignee, whether the assignment be good at law or in equity only. (Hessell v. Brown 66 Ill. App. 131; Hesse v. Griggs, 150 Ill. 161.) Any order, writing or act which makes an appropriation of a fund, amounts to an equitable assignment of the fund. (Mason v. Chicago Title & Trust Co., supra.) In my opinion the language of the instrument is sufficient to identify the property in question and to constitute a valid, legal assignment of the same.

The appellee also claims that it is not shown that Eliza Brown, who executed the assignment as the same person as Eliza Brown, who is identified in the deed of bequest, as an heir of Mary M. Brown; that the instrument in question is not authentic or genuine and that its execution was not properly proven as an authentic one to admission in evidence. The first of these objections was not raised in the trial court. The record shows that the original instrument was admitted in evidence

without objection. That question cannot be first raised in this court.

The objection that the instrument is based on no legal consideration is embraced in the general objection that the instrument is invalid and illegal. It is enough to say that if the instrument shows only a good consideration, the rule is that as against the parties, their heirs or those who represent their rights only, the question of consideration is immaterial, and a purely voluntary conveyance based on such a consideration is valid. (8 R.C.L. Deeds 961.) However, in this case the instrument after reciting what is ordinarily termed a good consideration, also recites that the assignment is made upon "other valuable consideration". We think there is no force in the objection.

The contention that the county court was without jurisdiction to recognize the assignment is without merit. The cited section of the Garnishment Act provides the method by which the assignee of a distributive share in an estate may protect his interest against garnishment by creditors of the assignor and is foreign to the issue in this case. In *Shepard v. Clark* 38 Ill. App. 66, a will provided that after the expiration of a life estate, certain real estate should be sold and the proceeds divided among persons named. One of them executed a quit claim deed to his interest in the real estate to a stranger. After the termination of the life estate the real estate was sold, and it was held that the deed was an equitable assignment of the grantor's interest in the proceeds of the sale, and that the county court had equitable jurisdiction of the settlement of estates and the adjustment of the accounts of executors and administrators and might adopt equitable forms of procedure. The distributee's share was ordered paid to the purchaser. We think the rules laid down in that case are applicable to the case at bar. (See also *Security Bank of New York v. Callahan*, 107 N.E. 387.)

without objection. That question cannot be first raised in this court. It may be raised in the court below.

The objection that the instrument is based on no legal

consideration is embraced in the general objection that the instrument is invalid and illegal. It is enough to say that if the instrument shows only a good consideration, the rule is that as against the parties, their heirs or those who represent their rights only, the question of consideration is immaterial, and a

purely voluntary conveyance based on such a consideration is valid. (8 N.Y.2d 201.) However, in this case the instrument

must show something which is ordinarily termed a good consideration.

also recites that the assignment is made upon "other valuable

consideration." We think there is no force in the objection.

The contention that the county court was without

jurisdiction to recognize the assignment is without merit. The cited section of the Government Act provides the method by which the assignee of a distributive share in an estate may protect his interest against encumbrances by executors of the assignor and is foreign to the issue in this case. In *Shepard v. Clark* 38 Ill.

App. 66, it was provided that after the expiration of a life

estate, certain real estate should be sold and the proceeds

divided among persons named. One of them executed a quit claim deed to his interest in the real estate to a stranger. After the termination of the life estate the real estate was sold, and it

was held that the deed was an equitable assignment of the grantor's

interest in the proceeds of the sale, and that the county court

had equitable jurisdiction of the settlement of estates and the

adjustment of the accounts of executors and administrators and

might adopt equitable forms of procedure. The distributee's

share was ordered paid to the purchaser. We think the rules

laid down in that case are applicable to the case at bar. (See

Par. 6 of Sec. 71 of the Administration Act requires claims against estates to be filed within one year after the granting of letters. It has no application to the assignment in question. In no sense is an assignment considered to be a claim against an estate within the purview of the statute.

Appellee infers bad faith against the administrator in suggesting that the instrument was not recorded in California until the day after the assignor's death; that it was not filed or presented in open court in this cause until the year 1921; and that the assignee has never appeared in this cause by himself or by counsel, but his assignment is presented only by appellant. The record is barren of any other related fact or testimony tending to support the inference. Without such evidence it cannot be said that the circumstances show bad faith.

Holding as we do, that the assignment is valid and sufficient to convey the interest of Edith L. Hupert in the personal estate of Mary E. Brown, deceased, the decree of the circuit court must be reversed and the cause remanded with directions to overrule the objections of appellee.

Reversed and remanded with directions.

Jan. 5 of 1906. VI of the Administration and requires

claims against estates to be filed within one year after the
opening of the estate. It has no application to the assignment
in question. In no sense is an assignment considered to be a
claim against an estate within the view of the statute.

Appellee insists that the assignment is not a claim against
the estate. It is contended that the assignment was not recorded in California
until the day after the creditor's death; that it was not filed
or presented in open court in this case until the year 1901;
and that the creditor had never appeared in this case by his
self or by counsel, but his assignment is presented only by
appellant. The record is void of any other relevant facts as
testimony to the facts of the case. It is contended that the
evidence is so clear that the assignment is not a claim
against the estate.

It is contended that the assignment is void and
nullified to secure the interest of John L. Brown in the
personal estate of Mary L. Brown, deceased. The estate of the
deceased should not be reversed and the same should be
affirmed to overcome the objections of appellee.

It is contended that the assignment is void and
nullified to secure the interest of John L. Brown in the
personal estate of Mary L. Brown, deceased. The estate of the
deceased should not be reversed and the same should be
affirmed to overcome the objections of appellee.

It is contended that the assignment is void and
nullified to secure the interest of John L. Brown in the
personal estate of Mary L. Brown, deceased. The estate of the
deceased should not be reversed and the same should be
affirmed to overcome the objections of appellee.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS I. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

... Second District of the City of New York
... that the following is
... in my office.

... in Testimony Whereof I
... and Appellate

... and hereby certify

6085u 7708
AT A TERM OF THE APPELLATE COURT,

2451.A. 641#3

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

FRANKLIN H. BOGGS

Hon. ~~AUGUSTUS A. FARLOW~~, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 25 1927

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

ERN COURT APPELLATE COURT
IN THE
STATE OF ILLINOIS

At Dallas, on Tuesday, the 14th day of April, 1908
of our Lord and Saviour Jesus Christ and twenty years
for the Second District of the State of Illinois

Hon.
Hon. NORMAN L. JONES, Justice.
FRANKLIN H. ROGERS
JULIUS E. JOHNSON, Clerk.
FLOYD S. CLARK, Sheriff.

REMEMBERED; that afterwards to-wit: we
the opinion of the Court, we
of said Court, in the word and figures
to-wit:

D. B. McPherson, Appellee,	:	
	:	
v.	:	Appeal from the
	:	County Court of
The Board of Education of	:	Lake County.
the Waukegan Township High	:	
School District, Appellant,	:	

Jones J:

Appellee, D. B. McPherson, was a school teacher and physical director in the Waukegan Township High School. On July 27, 1922, he entered into a written contract with appellant by the terms of which he was to teach in that school for thirty-eight weeks at a salary of \$2200 payable in ten equal installments. He began teaching in September 1922. About February 1, 1923, he severely punished a pupil in one of his classes. His action caused considerable comment and discussion, and on February 5, 1923, he tendered his resignation to appellant. No action having been taken upon the resignation he withdrew it on February 8, 1923, at the same time requesting an investigation of the charges against him. William F. Weiss was appointed by the President of the School Board as chairman of a committee to make the investigation. Appellee employed J. G. Welch, an attorney, to represent him. This attorney had several conferences with the chairman of the committee, and testified on the trial that he submitted a proposition to the chairman, which in substance was, that the board might accept McPherson's resignation at the beginning of the Spring vacation, provided his March salary was paid. The proposition was accepted and on March 6, 1923, an entry was made of record by the school board accepting the resignation and terminating McPherson's employment on March 23, 1923. Welch also testified that the arrangement was made with appellee's approval, but appellee

D. B. McPherson, Appellee,
v.
The Board of Directors of
the Waukegan Township High
School District, Appellant.

Appeal from the
County Court of
Lake County.

Jones 1:

Appellee, D. B. McPherson, was a school teacher and physical director in the Waukegan Township High School. On July 27, 1922, he entered into a written contract with appellant by the terms of which he was to teach in that school for thirty-eight weeks at a salary of \$2800 payable in ten equal installments. He began teaching in September 1922. About February 1, 1923, he severely punished a pupil in one of his classes. This action caused considerable comment and discussion, and on February 5, 1923, he tendered his resignation to appellant. No action having been taken upon the resignation he withdrew it on February 8, 1923, at the same time requesting an investigation of the charges against him. William F. Weiss was appointed by the President of the School Board as chairman of a committee to make the investigation. Appellee employed J. G. Welch, an attorney, to represent him. This attorney had several conferences with the chairman of the committee, and testified on the trial that he submitted a proposition to the chairman, which in substance was, that the board might accept McPherson's resignation at the beginning of the Spring vacation, provided his March salary was paid. The proposition was accepted and on March 6, 1923, an entry was made of record by the school board accepting the resignation and terminating McPherson's employment on March 23, 1923. Welch also testified that the arrangement was made with appellee's approval, but appellee

denies that he gave him any authority to offer his resignation or to make such an arrangement.

Appellee instituted this suit to recover the difference between the salary he would have earned had he continued in appellant's employ and his actual earnings during the unexpired portion of his contract. The cause has been tried twice and in each case a verdict was returned in favor of appellee for \$411.82.

To the declaration appellant filed the general issue and a special plea alleging that appellee voluntarily resigned and terminated his contract. Accompanying the pleas was an affidavit of merit in which it is set up as the defense that plaintiff voluntarily resigned and withdrew from the employment. It is well settled that a defendant is restricted to the defense set up in the affidavit. It was so held when this cause was previously before this court under the same title, reported in 235 Ill. App. 426.

A number of errors are assigned for reversal^{ed} of the judgment of the trial court. Appellant's principal contention is that it was error to refuse the admission of testimony of Weiss as to actions taken by the Board prior to March 6th. We have examined the record in this particular and without quoting the colloquy between the court and counsel, we fail to find any error in the court's ruling. If the matters had been otherwise competent, they were not so presented to the court that exceptions could be preserved to the rulings on them. No questions touching the matters sought to be proved were propounded to any witness. A conversation between court and counsel in which counsel expresses a desire to offer certain evidence, which the court is inclined not to receive, does not amount to an offer of the evidence and a refusal to admit it, upon which assignment of error can be based. (Chicago City Ry. Co. v. Carroll, 206 Ill. 318; Martin v. Hertz, 224 id. 84.)

fact that he was the only one who was not

or to make such an agreement.

Appellee instituted this suit to recover the difference

between the salary he would have earned had he continued in
the employ of the appellant and his actual earnings during the unexpired
portion of his contract. The cause has been tried twice and in
each case a verdict was returned in favor of appellee for \$411.82.

To the decision appellee filed the general issue

and a special plea alleging that appellee voluntarily resigned
and terminated his contract. Accompanying the plea was an affidavit
of merit in which it is set up as the defense that he
voluntarily resigned and withdrew from the employment.
It is well settled that a defendant is restricted to the defense
set up in the affidavit. It was so held when this cause was
tried before this court under the same title, reported in

206 Ill. App. 436. He recovered his salary

and a number of errors are assigned for reversal of the
trial court. Appellee's principal contention
is that it was error to refuse the admission of testimony of
him as to actions taken by the Board prior to March 6th.
To have examined the record in this particular and without
making the colloquy between the court and counsel, we fail to
find any error in the court's ruling. If the matters had been
otherwise competent, they were not so presented to the court.

That questions could be preserved to the rulings on them. No
question was presented by the matters as to the ruling on them.
It is well settled that a question must be preserved and cannot
be raised for the first time on appeal. In which counsel expressed a desire to call certain witnesses,
which the court is believed not to refuse. There was no error
in the ruling of the court and a reversal is not warranted.

Assignment of errors can be based on (Chicago City Ry. Co. v.

Appellant complains of the 2nd, 3rd and 6th instructions given at the instance of appellee. The 2nd and 3rd instructions relate to the right of a teacher to inflict corporal punishment. The 6th instruction told the jury that a board of education is estopped to assign any reason for dismissal of a teacher, other than that shown by its record. None of these instructions was pertinent to the issue. It is not every error, however, which will justify a reversal. It must appear from the record that upon another trial, if the same error does not intervene, a different result might reasonably be expected or that the error has deprived the defendant of some substantial legal right. Where it can be said from the record that the error assigned could not reasonably effect the result of the trial, the judgment of the trial court should be affirmed. (Stansfield v. Wood 231 Ill. App. 586; People v. Heard 305 Ill. 319.) There is no reasonable ground to think that upon another trial, if the instructions complained of were not given, a different verdict would follow.

Appellant's 3rd instruction in substance told the jury that if they believed from the evidence that Welch made the arrangement for appellee's resignation and was then acting within the scope of his authority, and that the action of the committee and appellant was in good faith, appellant was not guilty of wrongfully discharging appellee. The instructions fully and plainly stated the issue and embraced the real question in this case--whether Welch had authority to offer appellee's resignation and make the arrangement which he did make for the termination of appellee's employment. The jury found a verdict for McPherson and inasmuch as it is the second verdict in his favor we are not inclined to disturb it. A verdict will not be set aside on review as against the weight of the evidence, unless manifestly against its weight. As we view it, this case comes within that

[illegible]

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rule. We find no reversible error in this record and the judgment of the county court is affirmed.

Judgment affirmed.

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STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

The following is a list of the names of the persons who have been
 named in the report of the committee on the subject of the
 proposed amendment to the constitution of the State of Illinois.
 The names are given in the order in which they were named in the
 report.

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 proposed amendment to the constitution of the State of Illinois.
 The names are given in the order in which they were named in the
 report.

6086a

AT A TERM OF THE APPELLATE COURT,

245 LA. 641 #4

Begun and held at Ottawa, on Tuesday, the fifth day of April, in

the year of our Lord one thousand nine hundred and twenty-seven,

within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. ~~AUGUSTUS A. PARTLOW~~ FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 29 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

1748 A 7510

of our Lord one thousand nine hundred and twenty-seven
A for the Second District of the State of Illinois:

REMEMBERED, that afterwards, so-wit: On
the opinion of the Court was filed in the
as of said Court, in the words and figure

C.S. KILBOURNE, Appellee,	:	
	:	Appeal from the City
v.	:	Court of the City of
	:	Kewanee, Illinois.
CLYDE W. MILLER, Appellant,	:	

Jones J:

On September 2, 1925, C. S. Kilbourne began a suit in attachment in the city court of the city of Kewanee against W. M. Glenn, and the Savings Bank of Kewanee was served as garnishee. Glenn filed a plea to the jurisdiction of the court in which it was averred that he resided at Tribune, Kansas; that he was not found in Henry County, Illinois, nor in any other county in the State of Illinois; that service was had upon him by publication and mailing notice thereof to him; and that he had no property in Henry County liable to attachment or garnishment.

Clyde W. Miller filed an interpleader in which he alleged that the \$2500 held by the Savings Bank was his property and not the property of W. M. Glenn. The Savings Bank filed an answer as garnishee alleging that the bank was formerly the owner of certain notes signed by William R. Terpening, dated November 11, 1916, and secured by a lien on certain lands in Vernon County, Missouri; that the said W. M. Glenn paid to the Savings Bank of Kewanee the sum of \$2500, which was understood to be used to purchase \$2500 of one of the \$5000 notes of the above mentioned loan. The loan was afterwards taken up by C. S. Kilbourne, plaintiff, and the \$2500 is held by the Bank for the use of the legal holder of the said note. The cause was heard before the court without a jury; a finding was made in favor of

Appeal from the City
Court of the City of
Kewanee, Illinois.

C. S. KILBOURNE, Appellee,
v.
CLYDE W. MILLER, Appellant.

James B.

On September 2, 1923, C. S. Kilbourne began a suit in attachment in the city court of the city of Kewanee against W. M. Glenn, and the Savings Bank of Kewanee was served as garnishee. Glenn filed a plea to the jurisdiction of the court in which it was averred that he resided at Triana, Kansas; that he was not found in Henry County, Illinois, nor in any other county in the State of Illinois; that service was had upon him by publication and citation issued to him; and that he had no property in Henry County liable to attachment or garnishment.

Clyde W. Miller filed an interpreter in which he alleged that the \$2500 held by the Savings Bank was his property and not the property of W. M. Glenn. The Savings Bank filed an answer as garnishee alleging that the bank was formerly the owner of certain notes signed by William R. Thompson, dated November 11, 1916, and secured by a lien on certain lands in Vernon County, Missouri; that the said W. M. Glenn paid to the Savings Bank of Kewanee the sum of \$2500, which was understood to be used to purchase \$2500 of one of the \$5000 notes of the above mentioned loan. The loan was afterwards taken up by C. S. Kilbourne, plaintiff, and the \$2500 is held by the Bank for the use of the legal holder of the said note. The case was heard before the court and a jury; a verdict was rendered in favor of the

Kilbourne that the \$2500 was the property of W. M. Glenn and not the property of the interpleader. Judgment was entered accordingly. An appeal has been prosecuted to this court by Clyde W. Miller. Pending the appeal in this Court C. S. Kilbourne died and his executor, the Illinois Merchants Trust Company of Chicago, was substituted as appellee.

The sole question for review is whether the money belongs to Glenn or Miller. Most of the facts are not in dispute. The evidence shows that in 1919, eight persons living in Kansas, including Glenn, Miller and Hogan, formed a syndicate and purchased of W. R. Terpening 1283 acres of land in Missouri subject to two trust deeds, the first one being to the Merchants Loan & Trust Company of Chicago for \$25,000 and the second one being to C. S. Kilbourne for \$15,000. Kilbourne subsequently sold the second trust deed and notes secured thereby to the Savings Bank of Kewanee. Later \$5,000 was paid on the second trust deed, leaving \$10,000 balance due, evidenced by two notes of \$5,000 each. In 1923, the interest on the notes secured by the second trust deed was unpaid and the Bank had commenced, or was about to commence, foreclosure proceedings.

Glenn had an agreement with E. C. Platt of Kansas City to buy the land. The owners were to settle all delinquent interest and have the second trust deed extended at least a year. The purchaser was to assume the balance of \$10,000. Glenn, Miller and Hogan at this time were the only three members of the syndicate willing to put up any more money on the land. After a conference with Miller and Hogan, Glenn went to Kewanee and had a conference with W. E. Gould, Vice-President of the Savings Bank and one of its managers. There is a dispute over what took place in this conference. Gould testified that he told Glenn that if he (Glenn) would pay \$2500 on the notes, together

Illinois that the \$2500 was the property of W. M. Glenn and not the property of the interpleader. Judgment was entered accordingly. An appeal has been taken to this court by Glenn W. Miller. Pending the appeal in this court U. S. Trust Company of Chicago, was substituted as appellee.

The sole question for review is whether the money

belongs to Glenn or Miller. Most of the facts are not in dispute. The evidence shows that in 1919, eight persons living in Kansas, including Glenn, Miller and Hogan, formed a syndicate and purchased of W. R. Terpening 1283 acres of land in Missouri and divided it into two trust deeds, the first one being to the Merchants Trust Company of Chicago for \$25,000 and the second one to U. S. Trust Company for \$15,000. Subsequently the second trust deed and notes secured the title to the land by foreclosure and sale. Later \$5,000 was paid on the second trust deed, leaving \$10,000 balance due, evidenced by two notes of \$5,000 each. In 1923, the interest on the notes secured by the first trust deed was unpaid and the bank had commenced foreclosure proceedings. Glenn had an agreement with E. C. Platt of Kansas City to buy the land. The owners were to settle all delinquent interest and have the second trust deed extended at least a year. The purchaser was to assume the balance of \$10,000. Glenn, Miller and Hogan at this time were the only three members of the syndicate willing to put up any more money on the land. After a conference with Miller and Hogan, Glenn went to Kansas and had a conference with W. L. Gould, Vice-President of the Savings Bank and one of its managers. There is a dispute over what took place in this conference. It is testified that Glenn that if he (Glenn) would pay \$2500 on the notes, together

with all taxes, interest and costs of foreclosure, the Bank would dismiss the foreclosure proceeding and extend the time of payment for one year. Glenn testified that he told Gould that Platt had bought the land and was to assume the indebtedness and the owners did not want to pay anything on the principal of the debt; that it was agreed that Glenn should pay \$2500, which should not be endorsed on the notes but should be for a one-fourth interest in the two notes of \$5000 each. Gould testified that the \$2500 was to be paid as an additional security.

The undisputed evidence is that Glenn paid to the Bank at that time \$6825 under the agreement, being the \$2500 in question in this case and other amounts due under the second trust deed. This amount was paid by a sight draft on Miller and by two checks of Glenn. The next day Glenn went to Chicago and paid \$1412.24 on the first trust deed by a sight draft on Miller. The total amount of these two sight drafts on Miller was \$3785. No receipt or other ~~written~~ writing was given Glenn at that time for these payments to the Savings Bank but Gould took one of the \$5000 notes and wrote in pencil under the figures \$5,000 the figures \$2500, but made no endorsement of the payment of the note, and he then placed the \$2500 in the "suspended note account" in the Savings Bank to the credit of Glenn. Gould testified that the endorsement on the note was by way of memorandum to keep track of the items. It was not a regular endorsement. It was a sort of memorandum in pencil that the amount of money was paid by Glenn and if the notes were afterwards paid, this money was to go back to Glenn. Platt purchased the land, assumed the indebtedness, but afterwards made default in the payment of interest and went into bankruptcy. Kilbourne took up the second trust deed notes from the Savings Bank and paid \$10,000 and interest in full.

with all taxes, interest and costs of foreclosure, the bank would dismiss the foreclosure proceedings and allow the time of payment for one year. Glenn testified that he told Gould that first he would pay the bank and was to assume the indebtedness and the owners did not want to pay anything on the principal of the debt; that it was agreed that Glenn should pay \$2500, which should not be endorsed on the notes but should be for a one-fourth interest in the property of 1900 East 2nd St. Gould testified that the \$2500 was to be paid as an advance payment. The undisputed evidence is that Glenn paid to the bank at that time \$2500 under the agreement, being the \$2500 in question in this case and other amounts due under the second trust deed. This amount was paid by a night draft on Miller and by two checks of Glenn. The next day Glenn went to Chicago and paid \$12.24 on the first trust deed of a night draft on Miller. The total amount of these two night drafts on Miller was \$24.24. To receive or cash these drafts was given Glenn at that time for these amounts to the Savings Bank but Gould took one of the \$5000 notes and wrote in Genell under the figures \$5,000 the figures \$2500, but made no endorsement of the payment of the note, and he then placed the \$2500 in the "unredeemed note account" in the Savings Bank to the credit of Glenn. Gould testified that the endorsement on the note was by way of memorandum to keep track of the items. It was not a regular endorsement. It was a note of memorandum. Gould testified that the amount of money was paid to Glenn and the notes were afterwards paid, this money was to go back to Glenn. First payment was made, around the 1st of January, and then words were entered in the account of interest and was later back up the second trust deed and interest thereon. From the Savings Bank and paid \$12.24 and interest thereon.

He then foreclosed the mortgage and bought in the land at trustee's sale. Afterwards, he commenced this attachment suit and served the Bank as garnishee in order to reach the \$2500 in the bank which he claimed was the property of Glenn. Glenn testified that in April or May, 1924, Miller called his attention to the fact that there was nothing to show that he, Miller, owned this interest; and that all of the business had been done by Glenn. Thereupon Glenn gave to Miller a written assignment of all the interest in said trust notes, which assignment was introduced in evidence. On January 2, 1925, Gould wrote a letter to Glenn as follows:

"You paid \$2500 on one of the notes and we endorsed it in pencil with the understanding that when the balance was paid on these notes this amount would be sent to you; the understanding being that we were to have our full \$7500 and interest thereon first before any amount would come to you."

On cross examination, Gould testified that he knew two or three other persons were interested with Glenn in the transaction, one of whom was Miller; that he understood Miller was putting up part of the money; and that the business was being transacted by Glenn for himself and his associates.

The Bank, by its answer as garnishee, admitted that Glenn paid the \$2500 to the Bank with the understanding that it was to be used to purchase \$2500 of one of the \$5000 notes. Glenn testified that it was paid for that purpose. Gould does not in express terms deny that it was so paid but claims that it was paid as an additional security, thus inferring that it was not paid for the purpose of buying an interest in the notes. The cashier got his understanding from Gould or Glenn because they were the ones who made the contract and apparently the only ones who knew the exact terms of the transaction. If the cashier got from Gould the facts as to how the \$2500 was paid,

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Gould testified that it was paid for that purpose. Gould does
it was to be used to purchase \$2500 of one of the \$5000 notes.
Gould said the \$2500 to the Bank with the understanding that
The Bank, by its answer as garnishee, admitted that

it seems strange that Gould testified as he did. To say the ~~is~~ least, these facts greatly lessened the force and effect of his testimony. If his testimony on this point is removed from the case then the undisputed evidence is that the money was paid for a one-fourth share in the \$10,000 loan. In the light of this evidence we are of the opinion that the money was paid with the intention of the parties that Glenn and his associates were to own one-fourth of the \$10,000 note.

Section 30, Chapter 28 of the statute, however, provides that if a note is payable to bearer, it is negotiated by delivery. If it is payable to order it is negotiated by endorsement completed by delivery. Section 31 provides that the endorsement must be written on the instrument itself or upon a paper attached thereto. Section 32 provides that the endorsement must be an endorsement of the entire instrument. None of these provisions of the statute were complied with; therefore Glenn and his associates did not acquire legal title to any part of the notes.

Even though it was the intention of the parties that Glenn and his associates were to have a one-fourth interest in the notes, and such intention was not carried out as provided by law, the question still remains as to the ownership of the money. Glenn and Miller both testified that the money was contributed by them and that Miller paid the major portion of it, and that it belonged to Miller entirely at the time the attachment suit was begun. Counsel for appellee insists that it was Glenn's money entirely and that Gould had no notice that anybody else was claiming any interest either in the land or in the money paid by Glenn. This contention is not supported by the evidence. Gould admitted he knew that other persons were interested with Glenn in the property and that Glenn was

acting in their behalf. He admitted that he knew that one of these persons was Miller and that Miller was putting up a part of the money. In fact over \$2000 was paid to Gould by a draft on Miller. This tends to show that the entire \$2500 was the property of Miller; at any rate the evidence conclusively shows that Miller owned at least a substantial part of it with Glenn. ¹

There are two well known rules of law which are applicable to the facts in this case. The first one is that an attaching creditor acquires, through an attachment, no higher or better right to the property attached than the defendant had when the attachment took place; and that a garnishment is an attachment of the effects of a debtor in the hands of a garnishee, and creates no lien upon anything, but holds the garnishee to a personal liability. It reaches nothing that does not belong to the debtor.

The second rule of law is that an attachment and garnishment will not lie to recover a debt which is owned by two parties, one of whom is not indebted to the plaintiff in the attachment suit. In 28 C.J., page 97, Paragraph 125, the rule is announced as follows: "By the weight of authority, a debt due jointly to defendant and another person not a party defendant cannot be reached by garnishment. This rule is broadly based upon the doctrine that plaintiff's rights cannot rise higher than those which defendant had, and, as defendant could not alone have sued on the claim, plaintiff cannot in effect do so by way of garnishment. Moreover, garnishment proceedings in an action against less than all joint obligees are not adapted to the adjustment of the respective rights of the several obligees as against the obligator or as between themselves." This rule has been followed in this state in the following cases: *Saigel & Cooper v. Schueck*, 167

Ill. 522; Chicago & Northwestern Ry. Co. v. Scott, 174 Ill. 413; Commercial Bank v. Kirkwood & Co., 184 Ill. 139; Ryan v. Kimberly 118 Ill. App. 361; Independent Felter Co. v. Hiebig, 163 Ill. App. 16; Lay v. Myers, 181 Ill. App. 614; Bullard v. Mason 217 Ill. App. 401.

In this case it therefore follows that if the fund belongs entirely to Miller, it cannot be attached for a debt due from Glenn; or if Miller owns a part of the fund and Glenn the remainder, it cannot be attached in this proceeding.

In either event the judgment cannot be sustained and must be reversed and the cause remanded with directions to dismiss the suit.

Reversed and remanded with directions.

[illegible]

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

TABLE I

Amount of the State of Ohio
and a comparison of the
to the rest of the State

Amount of the State

Amount of the State

6087
AT A TERM OF THE APPELLATE COURT,

245 I.A. 642^{#1}

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 29 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

AT A TERM OF THE SUPREME COURT

HON. THOMAS M. LEE,
HON. MORRIS L. JONES, Just.

W. C. CRAWFORD, Clerk.

1897

1897
THE COURT

Francis Hickey, minor,
by Frances Hickey, his
mother and next friend,
Appellee,

Appeal from Circuit
Court of Winnebago County.

v.

Roy Straus, Appellant,

Jones J:

This suit was instituted by appellee Francis Hickey, a minor, by his next friend. He was travelling north in a Ford automobile along Kishwaukee Street in the city of Rockford at or near its intersection with Twentieth Avenue. Twentieth Avenue runs east and west and intersects Kishwaukee Street from the east, but does not continue to the west of that street. A taxicab owned by the defendant was travelling in a southerly direction along Kishwaukee Street and a collision occurred at or near the intersection. The accident happened in the evening. Appellee's car was demolished and was afterwards sold for \$30. The evidence shows that it was practically new and worth about \$300 before the accident. One of plaintiff's hands was cut, requiring eight stitches, and he was deprived of its use for about two weeks. He paid the doctor who dressed his wound \$15. A trial was had before a jury, which returned a verdict for plaintiff in the sum of \$285. From a judgment on the verdict this appeal followed.

A number of errors are assigned, but the only ground urged for reversal is the conduct of plaintiff's attorney. It appears there were four occupants of the taxicab, besides the driver--Miss McGee, Mrs. Ellington, Fred Fell and R. E. Hendricks. The latter had testified they were enroute to New Milford. On cross examination, attorney for plaintiff interrogated him as to the particular place in New Milford they were going. The

Appeal from Circuit
Court of Winnebago County.

Francis Hickey, Plaintiff,
vs.
Roy Stevens, Appellant.

James L.

This suit was instituted by appellee Francis Hickey, a minor, by his next friend. He was travelling north in a Ford automobile along Kishwaukee Street in the city of Rockford at or near its intersection with Twentieth Avenue. Twentieth Avenue runs east and west and intersects Kishwaukee Street from the east, but does not continue to the west of that street. A taxicab owned by the defendant was travelling in a southerly direction along Kishwaukee Street and a collision occurred at or near the intersection. The accident happened in the evening. Appellee's car was demolished and was afterwards sold for \$30. The evidence shows that it was practically new and worth about \$200 before the accident. One of plaintiff's hands was cut, requiring eight stitches, and he was deprived of its use for about two weeks. He paid the doctor who dressed his wound \$15. A trial was had before a jury, which returned a verdict for plaintiff in the sum of \$285. From a judgment on the verdict this appeal followed.

A number of errors are assigned, but the only ground urged for reversal is the conduct of plaintiff's attorney. It appears there were four occupants of the taxicab, besides the driver--Miss McGee, Mrs. Ellington, Fred Hall and E. A. Venturini. The latter had testified they were enroute to New Milford. The cross examination, attorney for plaintiff interrogated him as to the particular place in New Milford they were going. The

witness replied they were going to visit friends. He was then asked who the friends were. Upon his reply that he did not remember, plaintiff's attorney asked him "Now as a matter of fact Mr. Hendricks, wasn't it true you were going to a vacant cottage down there?" The witness denied this and appellant's counsel objected as follows: "I object to that, how can it be proper here?" Plaintiff's attorney interjected, "Because it is true." Appellee claims that the questions were properly asked to test the memory, truth and veracity of the witness, but no showing is made that comports with that theory and no effort was made to impeach him. The questions did not tend to illicit answers that would throw any light upon the issues. It is quite apparent that it was the intention to create in the minds of the jury, suspicion and prejudice against the interests of appellant by besmirching the character of the witnesses. It was uncalled for and highly improper. Counsel's volunteer statement that "it is true" was extremely bad.

Later in the cross examination, the attorney for plaintiff persistently questioned the witness with a view of showing that the defendant was insured and that an insurance company was defending the suit. Inferentially, the attorney disclaims any attempt to transgress a rule thoroughly understood by the legal profession. The rule referred to is so well settled and the decisions upon the subject so numerous that it is unnecessary to cite the cases relating to it. If we were not of the belief that the properly presented facts in the case warranted the verdict, we would unhesitatingly reverse the judgment because of the errors of plaintiff's counsel. But as that misconduct is the only ground urged for reversal and as the verdict and judgment are well supported by the evidence, we are inclined, under the rule laid down in *Eldorado Coal Co. v. Swan* 227 Ill.

witness replied they were going to visit friends. He was then asked who the friends were. Upon his reply that he did not remember, Plaintiff's attorney asked him "Now as a matter of fact Mr. Hendricks, wasn't it true you were going to a vacation cottage down there?" The witness denied this and appellant's counsel objected as follows: "I object to that, how can it be proper here?" Plaintiff's attorney interjected, "Because it is true." Appellee claims that the questions were properly asked to test the memory, truth and veracity of the witness, but not showing is made that compacts with that theory and no effort was made to impeach him. The questions did not tend to impeach or show that would throw any light upon the issues. It is quite apparent that it was the intention to create in the minds of the jury suspicion and prejudice against the interests of appellant by besmirching the character of the witnesses. It was recalled for and highly improper. Counsel's volunteer statement that "it is true" was extremely bad.

Later in the cross examination, the attorney for Plaintiff persistently questioned the witness with a view of showing that the defendant was insured and that an insurance company was defending the suit. Intentionally, the attorney disclosed an attempt to mislead a jury thoroughly understood by the jury. The rule referred to is so well settled and the decisions upon the subject so numerous that it is unnecessary to cite the cases relating to it. If we were not of the belief that the properly presented facts in the case warranted the verdict, we would hesitatingly reverse the judgment because of the errors of Plaintiff's counsel. But as that mis- conduct is the only ground urged for reversal and as the verdict and judgment are well supported by the evidence, we are bound to affirm the rule laid down in *Illinois v. ...*

-3-

586. to affirm the judgment. The judgment of the circuit court is therefore affirmed.

Judgment affirmed.

to allow the jury to find the defendant guilty of the crime charged. The jury is the only body that can do this.

It is the duty of the jury to find the defendant guilty if the evidence is sufficient to prove the crime beyond a reasonable doubt. The jury is the only body that can do this.

The jury is the only body that can find the defendant guilty of the crime charged. The jury is the only body that can do this.

The jury is the only body that can find the defendant guilty of the crime charged. The jury is the only body that can do this.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

60882
AT A TERM OF THE APPELLATE COURT,

2451.A. 642 #2

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. ~~FRANKLIN H. BOGGS~~
~~AUGUSTUS A. PARTLOW~~, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

' SEP 23 1927' the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



of our Lord one thousand nine hundred and twenty-on on
October, on Tuesday, the fifth day of April, in

JUSTUS A. JOHNSON, Clerk.
S. CLARK, Secretary.

REMEMBERED, that at a conference, to-wit: On
the opinion of the Court was filed in the
of said Court, in the words and figures

In Re: ESTATE OF AMANDA	:	
WEAVER, DECEASED,	:	
Appellee,	:	
	:	Appeal from the
v.	:	Circuit Court of
	:	Knox County.
J. W. WEAVER,	:	
Appellant.	:	

Jones J:

Appellant, J. W. Weaver, filed his claim in the County Court of Knox County against the Estate of his mother Amanda Weaver, for \$4666.45 and interest, and it was allowed for \$4967.82. The administrator appealed to the Circuit Court where there was a trial by jury, verdict and judgment against appellant. He has prosecuted an appeal to this court.

The claim is based upon an alleged loan of \$1500 and interest made by appellant to Amanda Weaver on January 4, 1887 for the purpose of paying off a mortgage on certain land owned by her.

On April 6, 1886, appellant and his mother purchased 160 acres of land in Kansas, subject to a mortgage for \$1500. On January 4, 1887, she conveyed the east half of the land to appellant, and on the same day he conveyed the west half of the land to her. The deed to appellant was never filed for record. He claims that while it was an absolute deed on its face, it was in fact a mortgage given to secure \$1500 which appellant loaned the said Amanda Weaver to pay off the mortgage, and that the transaction was had with the understanding that as soon as she sold the land she would pay him \$1500 and interest out of the proceeds of the sale. But appellee contends that these two deeds were made merely for the purpose of making a partition of the land between the owners.

On January 23rd, 1890, appellant and his wife re-conveyed to Amanda Weaver the east half of said land. This

Appeal from the
Circuit Court of
Knox County.

In Re: Estate of
Amanda Weaver,
Deceased.
Appellee.
v.
J. W. Weaver,
Appellant.

Jones 11

Appellant, J. W. Weaver, filed his claim in the County Court of Knox County against the Estate of his mother Amanda Weaver, for \$4666.45 and interest, and it was allowed for \$4987.82. The administrator appealed to the Circuit Court where there was a trial by jury, verdict and judgment against appellant. He has prosecuted an appeal to this court.

The claim is based upon an alleged loan of \$1500 and interest made by appellant to Amanda Weaver on January 4, 1887 for the purpose of paying off a mortgage on certain land owned

by her.

On April 6, 1886, appellant and his mother purchased 100 acres of land in Kansas, subject to a mortgage for \$1500. On January 4, 1887, she conveyed the east half of the land to appellant, and on the same day he conveyed the west half of the land to her. The deed to appellant was never filed for record. He claims that while it was an absolute deed on its face, it was in fact a mortgage given to secure \$1500 which appellant loaned the said Amanda Weaver to pay off the mortgage, and that the transaction was had with the understanding that as soon as she sold the land she would pay the \$1500 and interest out of the proceeds of the sale. But appellee contends that these two deeds were made merely for the purpose of making a partition of the land between the owners. On January 23rd, 1890, appellant and his wife re-conveyed to Amanda Weaver the east half of said land. This

gave her_ title to the entire 160 acres. On March 19, 1904 she conveyed the west half of the land to Niel Wirt and the east half to John Oden.

In 1886, when appellant and his mother purchased the 160 acres, both resided in Rice County, Kansas. She later removed to Knox County, Illinois, where she lived for more than twenty years and until she died on January 6th, 1923, at a very advanced age. Appellant moved from Kansas to Oklahoma in 1892 or 1893, and in 1913 to Knox County, Illinois, where he lived in a house in DeLong, adjoining the one occupied by his mother, and the evidence shows they visited back and forth almost daily.

On October 14, 1888, appellant wrote a letter to his mother from Sterling, Kansas, in which he stated that he had to do something. He had been out of work for two years and had made nothing. Winter was coming on and he was not prepared for it. He thought there was money in holding the land but he could not do so. He had to get money out of it. He referred to it as his 80 acres and told his mother that if she would take it she could have it for \$1300; that for the last two years he had not made enough to live on. He was paying twelve per cent interest and could not keep a family and pay that amount of interest. He had bought only enough to keep from starving and had got down to a fine point in clothes.

On November 12, he wrote from Arkansas City, Kansas to his sister. The year the letter was written does not appear but it was prior to 1893 because he moved to Oklahoma at that time. In his letter he acknowledged receipt of \$10 from his sister and \$15 from his mother, which he had borrowed from them, and enclosed his notes for the same. He told about his work in Kansas, how hard up he was, that he had built

gave her title to the entire 160 acres. On March 19, 1904 she conveyed the west half of the land to Niel Wirt and the east half to John Oden.

In 1886, when appellant and his mother purchased the 160 acres, both resided in Rice County, Kansas. She later removed to Knox County, Illinois, where she lived for more than twenty years and died on January 27, 1911, at a very advanced age. Appellant moved from Kansas to Oklahoma in 1898 or 1899, and in 1913 to Knox County, Illinois, where he lived in a house in DeKalb, Illinois, the one mentioned in his return, and the evidence shows that he visited his mother almost daily.

On October 14, 1888, appellant wrote a letter to his mother from Sterling, Kansas, in which he stated that he had to do a meeting. He had been out of work for two years and had made nothing. Winter was coming on and he was not prepared for it. He thought there was money in holding the land but he could not do so. He had to get money out of it. He referred to it as his 80 acres and told his mother that if she would lend it she could have it for \$1300; that for the last two years he had not made enough to live on. He was paying twelve per cent interest and could not keep a family and pay that amount of interest. He had bought only enough to keep from starving and had got down to a fine point in clothes.

On November 18, he wrote from Arkansas City, Kansas to his sister. The year the letter was written does not appear but it was prior to 1898 because he moved to Oklahoma at that time. In his letter he mentioned that he had borrowed from his sister and \$15 from his mother, which he had borrowed from them, and enclosed his notes for the same. He told about his work in Kansas, and said he was going to the west.

two shanties on certain claims which took \$100 leaving him "strapped" and with nothing to live on; that he never thought he would get so hard up; that he never raised anything except for one year and for two years he had not farmed a foot of land; that he had to live on day's work and pay all expenses out of day's work; that if a man had a poor man's road to travel he had better be dead; that two of his children worked out to help themselves and a third helped at home.

If the claim of appellant is sustained it must be upon the testimony of Helen Hughes, whose deposition was taken. She is a daughter of appellant and granddaughter of Amanda Weaver, and according to her testimony, she resided at Galesburg, Illinois between 1913 and 1919. She then left Galesburg and resided in Los Angeles, California. During the time she was in Galesburg her father and grandmother lived in DeLong, on adjoining lots. She saw her father and grandmother together regularly every week and sometimes twice a week. She heard her grandmother speak many times in regard to the original mortgage, saying she had no way to meet it and that she had asked her daughters to let her have the money to pay it off, but being unable to get the money from them, appellant had loaned her \$1500. This witness lived in Kansas when she was four years old on the land purchased by her father and grandmother, and covered^{by} the mortgage. She claimed to have often seen the mortgage. She identified the deed of January 4, 1887 from her grandmother to her father and stated that she had seen it in his possession while he was talking to his mother, and had heard her grandmother tell him that if he did not record the deed and if she should sell the property she would pay him out of the money she got from the sale. She further testified that the grandmother afterwards sold the property

two blankets on certain claims which took \$100 leaving him "strapped" and with nothing to live on; that he never thought he would get so hard up; that he never raised anything except for one year and for two years he had not turned a foot of land; that he had to live on his work and pay all expenses out of his work; that if a man had a poor man's road to travel he had better be dead; that two of his children worked out to help themselves and a third helped at home.

It is claimed that appellant is acquainted with the fact that the testimony of Helen Hughes, whose deposition was taken, is a daughter of appellant and granddaughter of Amanda Weaver, and according to her testimony, she resided at Galisburg, Illinois between 1913 and 1919. She then left Galisburg and resided in Los Angeles, California. During the time she was in Galisburg her father and grandmother lived in Belmont, on Belmont Street. She saw her father and grandmother together regularly every week and sometimes twice a week. She heard her grandmother speak many times in regard to the original mortgage, saying she had no way to meet it and that she had sent her daughters to let her have the money to pay it off, but being unable to get the money from them, appellant had loaned her \$100. This witness lived in Kansas when she was four years old and was loaned purchased by her father and grandmother, and covered the mortgage. She claimed to have often seen the mortgage. She identified the deed of January 4, 1937 from her grandmother to her father and stated that she had seen it in his possession while he was talking to his mother, and that she had seen it in his possession while he was talking to his mother. She further stated that the grandmother afterwards sold the property

but did not pay her father; that she saw her grandmother pay him \$5 or \$10 on three or four occasions but could not tell the exact dates, except that the last payment was in March, 1919; that the grandmother said to the appellant "Well, if I live long enough I will get that mortgage paid up; if not, at my death you will get it. If I don't get it paid off, this will keep it alive."; that at the time the father received the money from the grandmother, he wrote on an envelope and stuck it in his pocket and said "All right, Mother, don't let it worry you"; that it was known in the family that Aunt Ella, a sister of appellant, had money belonging to Amanda Weaver, and at the time of the aunt's death about three years prior to the trial, she had on hand about \$12,000 of the grandmother's money. The witness also testified that she had heard her grandmother say that if Ella would only let her grandmother have the money she would pay father, but added, "He will get it when I die if not before."

The deed to appellant was absolute on its face^e. The law presumes a deed is what it purports to be, an absolute conveyance. (Gannon v. Molds, 209 Ill. 180; Williams v. Williams 180 id. 361; Fisher v. Green, 142 id. 80.) To show that a deed, absolute on its face, is a mortgage, the proof must be clear, satisfactory and convincing. (Deadman v. Yantis 230 Ill. 243; Burgett v. Osborne, 172 id. 227; Keithley v. Wood 150 id. 566.)

The evidence is far from clear, satisfactory and convincing that the deed was a mortgage. Appellant would have us believe that he gave his mother \$1500 to pay this mortgage and that the money was paid on January^a 4, 1887, the day the deed was made to him, and yet the mortgage was not released until May 26, 1887. We are of the opinion that the two deeds of January 4, 1887 were executed for the sole purpose of making a partition

but did not say her father; she saw her grandmother say
him to on 10 on base on four occasions but could not tell
the exact date, except that the last time was in March,
1937; that the grandmother said to the appellant "Well, if I
live long enough I will get that mortgage paid up; if not, at
my death you will get it. If I don't get it paid off, this
will keep it alive"; that at the time the father received the
money from the grandmother, he wrote on an envelope and stuck
it in the pocket and said "All right, Mother, don't let it
worry you"; that it was known in the family that Aunt Ella, a
sister of appellant, had money belonging to Amanda Weaver, and
at the time of the aunt's death about three years prior to the
trial, she had on hand about \$18,000 of the grandmother's money.
The witness also testified that she had heard her grandmother
say that if she would only let her grandmother have the money
she would pay father, but added, "He will get it when I die if
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believe that he gave his mother \$1500 to pay this mortgage and
that the money was paid on January 4, 1937, the day the deed was
made to him, and yet the mortgage was not released until May 26,
1937. We are of the opinion that the two deeds of January 4,
1937 were executed for the sole purpose of making a partition

of the land and not to secure the payment of \$1500, as contended by appellant. The two letters which appellant wrote to his mother and sister indicate that he was in close financial circumstances. He was borrowing money from each of them and sending notes to cover the loans. If his mother owned him \$1500 at this time and these were payments upon the indebtedness, it is strange he sent the notes and did not ask his mother to pay a part at least of what he claimed she owed him. A person in such straitened financial circumstances would certainly demand payment from one who owed him and especially from one so abundantly able to pay as Amanda Weaver was. In the letter to his mother, dated October 14, 1888, he referred to the 80 acres which had been deeded to him as his 80 acres, and urged her to buy it. On January 23, 1890, he conveyed this 80 acres to her for a stated consideration of \$1000. The evidence shows that several years before the mother died, she had about \$12,000 in personal property. In April, 1904, she had on deposit in the bank \$4596.10, and the inventory of her estate shows that she had \$10,800 of personal property at the time of her death.

Appellant claims that his mother recognized this debt on various occasions and paid various amounts thereon. The claim as amended and filed by appellant in the County Court shows that from May 22, 1913 to May 1, 1919, six payments were made on the indebtedness, totaling \$35, one being for \$10, and five being for \$5.00 each. We think these alleged payments were mere loans made by Amanda Weaver to appellant and the insistence that they were payments on a loan is made only to prevent the running of the statute of limitations. Almost thirty seven years elapsed from the date the alleged debt was contracted until the claim was filed against the estate. The law presumes a debt which has been due and unpaid and without

of the land and not to secure the payment of \$1500, as contended by appellant. The two letters appellant wrote to his mother and sister indicate that he was in close financial circumstances. It was borrowing money from each of them and sending notes to them. If his mother owned him \$1500 at this time and there were payments upon the indebtedness, it is strange he sent her notes and did not ask his mother to pay a part of what he claimed she owed him. A person in such straitened financial circumstances would certainly demand payment from one who owed him and especially from one so abundantly able to pay as Amanda Weaver was. In the letter to his mother, dated October 14, 1888, he referred to the 80 acres which had been lent to him as his 80 acres, and urged her to pay it. On January 2, 1890, he conveyed this 80 acres to her for a stated consideration of \$1000. The evidence shows that several years before the mother died, she had about \$12,000 in personal property. In April, 1904, she had on deposit in the bank \$4536.10, and the inventory of her estate shows that she had \$10,800 of personal property at the time of her death. Appellant claims that his mother recognized this debt on various occasions and paid various amounts thereon. The claim as amended and filed by appellant in the County Court states that from May 22, 1913 to May 1, 1919, six payments were made on the indebtedness, totaling \$25, one being for \$10, and five being for \$5.00 each. We think these alleged payments were mere loans made by Amanda Weaver to appellant and the inference that they were payments on a loan is made only to prevent the running of the statute of limitations. Almost thirty seven years elapsed from the date the alleged debt was contracted until the claim was filed against the estate. The law presumes a debt which has been due and unpaid and without

recognition for twenty years to have been paid. (Fagan v. Bach, 253 Ill. 588; Richards v. Carter, 201 id. 165; Chicago & Northwestern Ry. Co. v. Galt 133 id. 657.)

Where a party has permitted a debt to run without any effort to collect until the Statute of Limitations can be pleaded in bar, the court will not aid him on slight proof. The evidence should be clear and satisfactory to overcome the bar of the statute. (Wachter v. Albee, 80 Ill. 47; Carroll v. Forsyth, 69 id. 167.) The evidence in this case sustains the verdict of the jury and the judgment of the court on the facts.

Appellant insists that the two letters from appellant to his mother and sister were improperly admitted in evidence. These letters contained admissions of appellant which were contrary to his contention on the trial and were properly admitted.

Error is assigned on the giving and refusing of instructions and the rulings of the court in reference to the deposition of Helen Hughes. These objections are not argued except in plaintiff's reply brief and therefore will not be considered in detail. We have, however, examined the instructions and rulings of the court and find none of them sufficient to reverse the judgment.

The judgment will be affirmed.

Judgment affirmed.

There is a party has permitted a copy to you without
any effort to collect until the State of Wisconsin was
be placed in the hands of the party will not be able to
The evidence should be clear and satisfactory to the court
and of the evidence. [Weaver v. Albee, 80 Ill. 47; Danforth
v. Touhy, 80 Ill. 157.] The evidence is not satisfactory
and the verdict of the jury and the judgment of the court as to

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... We have, however, examined the

The judgment will be affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

THE
JOURNAL OF THE
ROYAL ANTHROPOLOGICAL INSTITUTE
OF GREAT BRITAIN AND IRELAND
VOLUME 34, PART 1, 1904

60812
AT A TERM OF THE APPELLATE COURT,

2451.A. 642 #2

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

FRANKLIN H. BOGGS
Hon. ~~AUGUSTUS A. PARTLOW~~, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 29 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

OF THE APPELLATE COURT.
12. 5.

JUSTUS L. JOHNSON, Clerk.
LEOYD S. CLARK, Sheriff.

REMEMBERED, that aforesaid, do-wit: ON
1927 the opinion of the Court was filed in
the of said Court, in the words and figures

Robert Kennie, a minor, by his	:	
next friend, Ralph Kennie, appellee,	:	
	:	
v.	:	Appeal from the
	:	Circuit Court of
	:	Peoria County.
	:	
Timothy Dailey, appellant.	:	

Jones J:

This is a suit of Robert Kennie, a minor, by his next friend, Ralph Kennie, against Timothy Dailey, to recover damages for an injury received in a collision between a motorcycle on which Kennie was riding, and an automobile driven by appellant, Dailey. A trial was had before a jury which rendered a verdict in favor of appellee in the sum of \$7500. Judgment was rendered on the verdict and appellant prosecutes this appeal.

The declaration originally consisted of four counts. The case went to the jury upon the first three counts, the fourth having been withdrawn. The first count charges that appellant so negligently, carelessly and recklessly drove and operated his automobile that it collided with appellee's motorcycle and occasioned the injury. In the second count the negligence charged against appellant is that he negligently, carelessly and unlawfully drove his car at a greater rate of speed than was reasonable and proper, having regard for the use of the way and so as to endanger lives or injure property or other persons lawfully using the way, to-wit, at a rate of speed in excess of 20 miles an hour, to-wit, at a speed of 40 miles an hour, in violation of the statute, and that by reason of the negligence and unlawful conduct of appellant, his automobile collided with appellee's motorcycle. The third count is similar to the first with the exception that it alleges that as the automobile

Appeal from the
Circuit Court of
Beekins County.

Robert Kennie, a minor, by his
next friend, Ralph Kennie, appellee,
v.
Timothy Bailey, appellant.

Jones 1:

This is a suit of Robert Kennie, a minor, by his
next friend, Ralph Kennie, against Timothy Bailey, to recover
damages for an injury received in a collision between a motor-
cycle on which Kennie was riding, and an automobile driven by
appellant, Bailey. A trial was had before a jury which rendered
a verdict in favor of appellee in the sum of \$7500. Judgment
was rendered on the verdict and appellant appeals. This
appeal.

The declaration originally consisted of four counts.
The case went to the jury upon the first three counts, the fourth
having been withdrawn. The first count charges that appellant
so negligently, carelessly and recklessly drove and operated
his automobile that it collided with appellee's motorcycle and
occasioned the injury. In the second count the negligence charged
against appellant is that he negligently, carelessly and un-
lawfully drove his car at a greater rate of speed than was
reasonably and proper, under the conditions of the way and
so as to obstruct the view of the highway and to cause the
injury. In the third count, appellant is charged with a
violation of the statute, and that by reason of the negligence
and unlawful conduct of appellant, his automobile collided
with appellee's motorcycle. The third count is similar to the
first with the exception that it alleges that as the automobile

and motorcycle approached each other and as the automobile came up to and even with the motorcycle, the automobile was so negligently, carelessly and unlawfully managed and ~~controlled~~ by appellant that it was driven over on to the east side of the highway, so that it passed over to the left and beyond the line in the middle of the public highway designating the space allotted for north and south bound traffic, and that by reason thereof the collision occurred.

Appellee was riding his motorcycle north along Knoxville Avenue in the city of Peoria at about nine o'clock at night at a rate of speed between 12 and 15 miles per hour. The locality is a residence district with houses on the east side of the highway, and a truck garden on the west side. A Nash car was proceeding north about 20 feet ahead of appellee. It was running about 15 miles an hour very close to the east edge of the pavement, which at that point is 20 feet wide. Appellee testified that the Nash car slackened its speed and pulled over to the east edge of the pavement, and that he passed it at about 12 to 15 miles an hour; that before going around the Nash car, he saw appellant's car about 250 to 300 feet north of him proceeding south. He places its speed at from 30 to 40 miles an hour. A disinterested witness fixed its speed at about 30 miles an hour. Appellant's car was a Ford Coupe. His brother and a friend were riding with him. Appellee claims that when he passed the Nash car, the wheels of his motorcycle were east of the black line in the center of the pavement; and that after he had passed it and was 15 to 20 feet ahead of it and about 3 feet east of the black line in the center, appellant's car suddenly swerved east over the black line, its left front wheel striking the left step and clutch of the motorcycle. The force of the collision threw appellee and his motorcycle off the pavement to the east.

and motorcycle approached each other and as the automobile came up to and over with the motorcycle, the automobile was so negligently, carelessly and unlawfully managed and controlled by appellant that it was driven over on to the east side of the highway, so that it passed over to the left and beyond the line in the middle of the public highway designating the space allotted for north and south bound traffic, and that by reason thereof the collision occurred.

Appellee was riding his motorcycle north along Knoxville Avenue in the city of Peoria at about nine o'clock at night at a rate of speed between 15 and 18 miles per hour. The locality is a residence district with houses on the east side of the highway, and a truck garden on the west side. A car was proceeding north about 20 feet ahead of appellee. It was running about 1 mile an hour very close to the east edge of the pavement, which at that point is 20 feet wide. Appellee testified that the Nash car slackened its speed and pulled over to the east edge of the pavement, and that he passed it at about 15 to 18 miles an hour, just before going around the Nash car, he saw appellant's car about 250 to 300 feet north of him proceeding south. He places its speed at 30 to 40 miles an hour. A disinterested witness fixed its speed at about 30 miles an hour. Appellant's car was a Ford Coupe. His brother and a friend were riding with him. Appellee claims that when he passed the Nash car, the wheels of his motorcycle were east of the black line in the center of the pavement, and just after he had passed it and was 15 to 20 feet ahead of it, and about 3 feet east of the black line in the center, appellant's car suddenly swerved east over the black line, its left front wheel striking the left step and clutch of the motorcycle. The force of the collision threw appellee and his motorcycle off the pavement to the east.

Appellant contends that the speed of his car was from 20 to 25 miles an hour; that the left wheels of his car were approximately 2 feet west of the center line of the pavement, and that as the front of his car was about even with the Nash car, appellee and his motorcycle came from behind the Nash car and attempted to ^{pass} ~~pass~~ between the two cars. He is corroborated by his brother and the other passenger in his car and to some extent by Miss Ludwig, who was riding in the Nash car. The evidence is conflicting and it is difficult to tell exactly the relative positions of the two cars and appellee's motorcycle at the time of the accident. There is evidence tending to support appellee's contention that he had passed the Nash car and was from 12 to 20 feet ahead of it before the collision, and his contention finds much support in the physical facts in the record. The evidence tends very strongly to show that when the Nash car came to a stop, it was from 6 to 7 feet south of appellee as he lay on the dirt road east of the pavement and his motorcycle was lying a few feet north of him. A portion of the Nash car was clear of the hard road to the east of the concrete where it was standing. By reason of the respective contentions of appellant and appellee, it was for the jury to determine the facts, and after examining the testimony in the record we cannot say that the verdict is so manifestly against the weight of the evidence that we would be justified in disturbing it.

Appellant criticises the 1st, 3rd, and 4th instructions given on behalf of appellee. The first instruction told the jury that while the burden of proof is upon the plaintiff and it is for him to prove his case by a preponderance of the evidence, still, if the jury finds that the evidence bearing upon the plaintiff's case preponderates in his favor, although but slightly, it would be sufficient for the jury to find the

Appellant contends that the weight of the evidence is in favor of his own version of the facts. He claims that the car was traveling at a speed of 30 to 35 miles an hour; that the front wheels of his car were approximately 2 feet west of the center line of the pavement; and that at the time of the crash his car was about even with the rear of appellee and his motorcycle came from behind the Nash car. He is correct in stating that the car was between the two cars. He is also correct in stating that his brother and the other passenger in his car were killed by the impact of the crash. He is also correct in stating that the car was traveling at a speed of 30 to 35 miles an hour; that the front wheels of his car were approximately 2 feet west of the center line of the pavement; and that at the time of the crash his car was about even with the rear of appellee and his motorcycle came from behind the Nash car. The evidence is conflicting and it is difficult to tell exactly the relative positions of the two cars and appellee's motorcycle at the time of the accident. There is evidence tending to support appellee's contention that he had passed the Nash car and was from 15 to 20 feet ahead of it before the collision, and his contention finds much support in the physical facts in the record. The evidence tends very strongly to show that when the Nash car came to a stop, it was from 5 to 7 feet west of appellee as he lay on the dirt road east of the pavement and his motorcycle was lying a few feet north of him. A portion of the Nash car was east of the point where the motorcycle was lying. By reason of the respective positions of appellee and appellee, it was for the jury to determine the facts, and after examining the testimony in this case we cannot say that the verdict is so manifestly against the weight of the evidence that we would be justified in reversing it. The first instruction told the jury that while the burden of proof is upon the plaintiff and it is for him to prove his case by a preponderance of the evidence, still, if the jury find that the evidence is in favor of the plaintiff's case preponderates in his favor, although not affirmatively, it would be sufficient for the jury to find the

issues in favor of the plaintiff and to find a verdict against the defendant. It is claimed that the word "slightly" vitiates the instruction and Teter v. Spooner, 305 Ill. 198 is cited in support of the contention. That case was a will contest and objection was there urged to an instruction using the words "clear preponderance". The court criticised the use of such adjectives as "clear" and "slight" but there is nothing said in that case which would justify us in reversing this cause. The opinion differentiates between judicial decisions which hold that evidence of mental incapacity must clearly preponderate to authorize the setting aside of a will, and those which deal with instructions stating that the contestant in a will case must prove such incapacity by a clear preponderance of the evidence. The opinion makes mention of the fact that instructions like the one in the case at bar are frequently given in actions of negligence.

In Norton v. Clark 253 Ill. 557 also a will case, an instruction similar to the instruction complained of here was given. The court, after stating that an instruction of that kind was introduced into the practice and approved in Taylor v. Felsing 164 Ill. 33 (a negligence case) has since become common, says, "In ordinary cases, where a mere preponderance of the evidence is sufficient, it cannot be said that it is error to give such an instruction, but a different rule has always been applied in testing the validity of a will." While it appears that the rule in will contests does not permit the use of qualifying adjectives in connection with the word "preponderance", instructions in almost precisely the same language as the instruction here have been repeatedly upheld in other cases by the Supreme and Appellate ^{to} Courts of this state. Such an instruction was recently upheld by this court in Fannon v. Morton, 228 Ill. App. 415. The reference made in the first instruction to "plaintiff's case" is criticised

as being misleading and apt to direct the jury's attention merely to testimony introduced by appellee. The use of such words, without reference to the allegations of the declaration, is not improper. (*Liska v. Chicago City Ry. Co.*, 318 Ill. 570; *Chicago City Ry Co. v. Nelson*, 215 id. 436.) There was no error in giving the instruction.

The first part of the 3rd instruction given on behalf of appellee is based upon the provisions of Section 22 of the Motor Vehicle Act. Among other things, it informed the jury that the act provides that if the rate of speed of a motor vehicle * * * * * operated upon a public highway in this state, outside the closely built up portions and the residence portions within any incorporated city, town or village, exceeds twenty miles an hour, such rate of speed shall be prima facie evidence that the person operating such motor vehicle is running at a rate of speed greater than is reasonable and proper having regard to the traffic and the use of the way, or so as to endanger the life or the limb or injure the property of any person. The instruction then tells the jury that if they find from the evidence that appellant's car was being driven at a rate of speed in excess of twenty miles an hour on a public highway within the incorporated limits of the city of Peoria, and that such speed in excess of twenty miles an hour was greater than was reasonable and proper having regard to the traffic and the use of the way, and was the proximate cause of the accident, and that appellee at and before the time he was injured was in the exercise of due care for his own safety, the jury should find the issues in favor of the plaintiff. A number of cases in the Appellate Court are cited and quoted from in criticism of this instruction. This court's attention is particularly called to *Johnson v. Pendergast*, 208 Ill. 255; and it is urged that

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regard to the traffic and the use of the way, or as to en-
danger the life or the limb or injure the property of any person.

The instruction then tells the jury that if they find from the
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the incorporated limits of the city of Peoria, and that such
speed in excess of twenty miles an hour was greater than was
reasonable and proper having regard to the traffic and the use
of the way, and was the proximate cause of the accident, and
that appellee at the time of the accident was in the
exercise of due care for his own safety, the jury should find
the issues in favor of the plaintiff. A number of cases in the
Appellate Court are cited and quoted from in support of this
instruction. This court's attention is particularly called
to *Lawrence v. Peoria*, 308 Ill. 555, and it is urged that

by reason of the holding in that case, the instruction is bad. In Johnson v. Pendergast, supra, an automobile was parked at a curb. The plaintiff was riding a motorcycle and as he came abreast of the car from the rear it turned out from the curb and a collision occurred. The defendant had looked back before starting the car and saw no one coming. The evidence tends to show the street was clear when she looked back. An instruction quoted an ordinance requiring the giving of a signal before stopping, starting or turning a vehicle, and told the jury that a failure to do so was prima facie evidence of negligence. The court held the instruction bad because the so-called prima facie case was met by the testimony of the defendant that she had looked back and saw no one coming, and also because there was evidence tending to show negligence on the part of the plaintiff by reason of the speed of his motorcycle, both of which elements were ignored by the instruction.

In the case at bar it is not claimed that appellee was exceeding a speed of 15 miles an hour at any time, and it is admitted that appellant was driving at a rate of at least 20 to 25 miles an hour through a residence district in the city of Peoria. We do not regard the ruling in the Pendergast case as applicable to the instruction complained of here. The jury in the instant case was not told by this instruction that any certain speed in miles per hour by appellant amounted to negligence. It left the jury to find from the evidence, whether or not appellant was driving his car in excess of 20 miles per hour at the time of the accident. If they so found, then they were at liberty to determine whether or not such speed was unreasonable and improper having regard to the traffic. If they found it was unreasonable and improper, then they were free to determine whether it was the proximate cause of the accident, and whether appellee was in the exercise of due care for his

by reason of the holding in this case, the instruction is not.
In *Johnson v. Johnson*, 1908, 100 Cal. 100, the court said:
"The plaintiff was riding a motorcycle and as he came
up to the car from the rear it turned out from the curb
and a collision occurred. The defendant had looked back before
starting the car and saw no one coming. The evidence tends to
show the plaintiff was also looking back. An instruction
was given to the jury that the plaintiff was negligent in
starting the car without looking back, and told the jury that
a failure to do so was the sole evidence of negligence. The
court held the instruction was because the so-called prima facie
case was met by the testimony of the defendant that she had
looked back and saw no one coming, and also because there was
evidence tending to show negligence on the part of the plaintiff
by reason of the speed of his motorcycle, both of which elements
were covered by the instruction."
In the case at bar it is not claimed that appellee
was exceeding a speed of 15 miles an hour at any time, and it
is stated that appellee was driving at a rate of at least
10 to 12 miles an hour through a residence district in the
city of Peoria. We do not regard the ruling in the foregoing
case as applicable to the instruction complained of here. The
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any certain speed in miles per hour by appellee amounted to
negligence. It left the jury to find from the evidence whether
or not appellee was driving his car in excess of 20 miles per
hour at the time of the accident. If they so found, then they
were at liberty to determine whether or not such speed was
unreasonable and improper having regard to the traffic. If they
found it was unreasonable and improper, then they were free to
determine whether it was the proximate cause of the accident,
and whether appellee was in the exercise of due care for his

own safety. It did not tell the jury, as did the instruction in the Pendergast case that certain facts made out a prima facie case of negligence. The instruction complained of contains all the elements necessary to direct a verdict. The first part of it is substantially in the language of the statute, and such instructions have been frequently upheld where pertinent to the issue. (Deming v. Chicago, 321 Ill. 341.) If appellee proved all the facts as set forth in the instruction he would be entitled to a verdict. We think it comes squarely within the rule announced by this court in Pannon v. Morton, supra. It is impracticable to review the Appellate Court cases cited by appellant, but we think it is sufficient to say they are not in point. The chief difference is that the instruction here complained of is not subject to the objections pointed out in the cases cited, in that it left it to the jury to determine whether the speed of appellant's car was the proximate cause of the injury and whether appellee was in the exercise of due care for his own safety. We think the instruction meets the doctrine laid down in Morrison v. Flowers 308 Ill. 189, in which the opinion was filed the same day as Johnson v. Pendergast, supra. The court in other instructions fully instructed the jury as to all of the defenses of appellant.

Appellant's first objection to the fourth instruction given on behalf of appellee is that it does not confine the damages to those averred in the declaration. The instruction limits the damages to such as are shown by the evidence. No claim is made that the evidence is not consistent with the averments of the declaration, and we regard the objection as not well taken. In C. R. I. & P. Ry. Co. v. Steckman, 224 Ill. 500, it was objected that an instruction of similar import which confined the damages to those shown by the evidence,

should have contained the language "under the issues presented by the pleadings." The court there held that the instruction was not open to the criticism offered. The verdict in the case at bar was within the amount of the ad damnum. Even if the instruction is defective, we do not think appellant's rights were prejudiced thereby and hence it was not reversible error to give it. To justify a reversal on account of error, it must appear that upon another trial, if the same error does not intervene, a different result might be reasonably expected, so that the error would deprive the defendant of some substantial right. Where it can be said that the error assigned could not reasonably affect the result of the trial, the judgment of the trial court should be affirmed. (People v. Heard, 305 Ill. 319).

It is also complained that this instruction permits the jury to award damages for loss of earnings and earning power as a result of the injury, without testimony to justify it. The record discloses that appellee was 19 years of age and had attended high school only two years. At the time of the accident he was an electrician in the employ of the Central Illinois Light Company. He was engaged in active work which required him to be upon his feet a great deal. His injury consisted of a comminuted fracture of the tibia, and the knee is stiff. The knee cap is about two inches above its natural place and is not connected with its lower tendon, so that the leg is prevented from functioning naturally. Two physicians testified that in their opinion the condition is permanent. There is no testimony in the record as to the amount of his earnings, but the record conclusively shows his earning capacity is impaired. At any rate, an instruction stating a correct proposition of law, as this one does, is not necessarily

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It was also a result of the injury, without testimony to justify it. The record discloses that appellee was 19 years of age at the time he attended high school only two years. At the time of his accident he was an electrician in the employ of the Central Illinois Light Company. He was engaged in active work which required him to be upon his feet a great deal. His injury consisted of a comminuted fracture of the tibia, and the knee is stiff. The knee cap is about two inches above its natural place and is not connected with the lower tendon, so that the leg is prevented from functioning naturally. Two physicians testified that in their opinion the condition is permanent. There is no testimony in the record as to the amount of his earnings, but the facts established by the evidence are undisputed. It may well be assumed that the plaintiff's earning capacity is impaired. It may well be assumed that the plaintiff's earning capacity is impaired. It may well be assumed that the plaintiff's earning capacity is impaired.

misleading or prejudicial, merely because it is inapplicable to the facts in evidence, and where it is not so, there is no ground for reversal. (38 Cyc. Trial 1622; G. & A. Ry. Co. v. Walters 217 Ill. 37; Illinois Match Co. v. C. R. I. & P. Ry. Co. 250 Ill. 396.)

It is also insisted that the instruction is bad because it enables the jury to award appellee such sum as they find from the evidence to be reasonable and fair compensation for all damages sustained or which may be sustained in the future, if any, as a direct and proximate result of the injury. The particular objection urged is that it permits the jury to speculate and award damages which are no more than possible and which are not even probable. We do not so view it. ^{The} nature of the injury and its permanency are undisputed. The instruction deals wholly with the measure of damages and limits it to the direct and proximate result of the injury. The rule against the recovery of uncertain damages generally has been directed against uncertainty as to cause rather than uncertainty as to measure or extent. In other words, the rule against uncertain or contingent damages applies only to such damages as are not the certain result of the breach or tort, and ~~to~~ ^{not} to such as are merely uncertain in amount. In many cases, although substantial damages are established, their amount, in so far as they are susceptible of pecuniary admeasurement, is either entirely uncertain or extremely difficult of admeasurement; in such cases, plaintiff is not denied all right of recovery, and the amount is fixed by the jury in the exercise of sound discretion under proper instructions from the court. This is particularly true of torts, especially those resulting in personal injuries. (Anderson v. Pan American Motors Corporation 232 Ill. App. 27). In connection with the complaint made of this instruction, it is urged that the trial court should not

relationship or practical necessity, it is inadvisable to the facts in evidence, and where it is not so, there is no ground for reversal. 188 U.S. 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

have permitted the two physicians who treated appellee to testify that in their opinion his injuries are permanent. Such opinions are competent and proper. (Hirsch v. Chic. Con. Tract. Co. 146 Ill. App. 501; Schaulder v. Chicago & Southern Traction Co. 160^{id.} 309; Ellis v. Chicago Rys. Co. 187 ^{id.} 461; T. W. & W. Ry. Co. v. Baddeley, 54 Ill. 13.) On questions of science, skill or trade or others of the like kind, persons of skill called as experts are permitted to give their opinion in evidence. (Chicago v. McGiven 78 Ill. 347; Chicago v. Didier 227 Ill. 575.) The authorities cited by appellant in support of his objections to this instruction deal with entirely different questions and have no application here.

Appellant complains of the court's refusal to give several of his offered instructions. Their substance is covered by other instructions given in his behalf and their refusal was not error. Lastly it is urged that the verdict and judgment are excessive. In view of the nature and extent of appellee's injuries, their permanent character, and the fact that he was in a hospital five months and incurred medical and hospital bills of over \$1400, we cannot say the amount is excessive.

Finding no reversible error in the record the judgment of the circuit court is accordingly affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

6090a
AT A TERM OF THE APPELLATE COURT,

245 I.A. 642 #4

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 29 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

1
DEPARTMENT COURT

Page 10 of 10

and twenty-500

REMARKS, that regarding
the opinion of the Co.

Village of Scales Mound, Appellant,	:	
	:	Appeal from the
v.	:	Circuit Court of
	:	Jo Daviess County.
R. J. Gesner, Appellee,	:	

Jones J:

The Village of Scales Mound, filed its bill in the circuit court of Jo Daviess County, against Appellee, R. J. Gesner, for a mandatory injunction to compel him to remove certain electric wires from a public street. A demurrer was sustained to the bill; appellant elected to stand by its bill; and an appeal is prosecuted to this court.

Appellee insists that the appeal should be dismissed for the reason that no final decree was entered from which an appeal could be prosecuted. The record shows the demurrer was sustained; that appellant elected to stand by its bill; and that the bill was thereupon dismissed for want of equity, and an appeal prayed for. The order is not as complete as it might be but is sufficient for the prosecution of an appeal.

Section 65, Clause 7, Chapter 24 of the Revised Statutes of 1927 vests cities and villages with power to lay out, open, alter and vacate streets, and to regulate the use of the same. Clause 10 of the same section authorizes municipal authorities to prevent and remove encroachments or obstructions upon streets. The power of a village, by ordinance, to authorize the use of public streets or parts thereof for private purposes has been denied. (People v. Corn Products Co. 286 Ill. 226.) A village holds its streets in trust for the benefit of the people. (Hoerrman v. Wabash Ry. Co. 309 Ill. 524.) The use of the street by the public includes the uninterrupted, unimpeded and unobstructed use of every portion and part thereof. It has the right to use all of the ground to travel upon, together with the right

Village of Seales Mound, Appellant,
: v.
: R. T. Gerner, Appellee,
: Appeal from the
: Circuit Court of
: to Daviess County.

James L.

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Appellee insists that the appeal should be dismissed for the reason that no final decree was entered from which an appeal could be prosecuted. The record shows the demurrer was sustained; that appellant elected to stand by its bill; and that the bill was thereupon dismissed for want of equity; and an appeal prayed for. The order is not as complete as it might be but is sufficient for the prosecution of an appeal.

Section 65, Clause V, Chapter 24 of the Revised Statutes of 1927 vests cities and villages with power to lay out, open, alter and vacate streets, and to regulate the use of the same. Clause 10 of the same section authorizes municipal authorities to prevent and remove encroachments or obstructions upon streets. The power of a village, by ordinance, to authorize the use of public streets or parts thereof for private purposes has been denied. (People v. Corn Products Co. 286 Ill. 526.) A village holds its streets in trust for the benefit of the people. (Hortman v. Wabash Ry. Co. 309 Ill. 524.) The use of the street by the public includes the uninterrupted, unimpeded and unobstructed use of every portion and part thereof. It has the right to use all of the ground to travel upon, together with the right

to enjoy the use of the air above and the ground beneath the surface. (Hibbard & Co. v. City of Chicago 173 Ill. 21; People v. Harris 203 id. 272.) Bay windows, porches, awnings, steps and other obstructions in streets have been declared to be nuisances and ordered removed. (Smith v. McDowell, 148 Ill. 51; Snyder v. City of Mt. Pulaski, 176 id. 397; People v. City of Danville, 242 Ill. App. 472; People v. City of Casey, 241 id. 226.)

In Carpenter v. The Capital Electric Co. 178 Ill. 29, it was held that the erection of poles and wires in a private alley, the fee to which was in the abutting owner, for the purpose of supplying lights to a private party who had an easement of travel over the alley, constituted an additional servitude, which the owner of the fee was not required to bear without compensation.

In City of Sullivan v. Illinois Public Service Co. 221 Ill. App. 561, a mandatory injunction was sustained which required an electric light company to remove its poles and wires from the streets where the license had expired, notwithstanding the fact that the electric light company had been furnishing to the city, electric power to operate its water pumps, and had made other arrangements to continue business.

The question is whether the allegations of the bill are sufficient to require appellee to answer. The bill alleges that appellant was a municipal corporation; that appellee was a private individual and without leave, compensation or license, strung wires across a public street for the purpose of carrying electric current from his garage to light his residence; that such wires are a menace to the public and a continuing trespass and nuisance; that a demand had been made upon him

to carry the use of the air space and the ground surface. (Hippard & Co. v. City of Chicago 173 Ill. 21; People v. Harris 203 Ill. 272.) Bay windows, porches, awnings, steps and other obstructions in streets have been declared to be nuisances and ordered removed. (Smith v. McDowell, 148 Ill. 51; Carter v. City of Mt. Pleasant, 176 Ill. 397; People v. City of Newville, 248 Ill. App. 472; People v. City of Casey, 241 Ill. 284.)

In *Garpenster v. The Capital Electric Co.* 178 Ill. 23, it was held that the erection of poles and wires in a private alley, the fee to which was in the abutting owner, for the purpose of supplying lights to a private party who had an easement of travel over the alley, constituted an additional servitude, while the owner of the fee was not required to bear the cost of compensation.

In *City of Sullivan v. Illinois Public Service Co.* 221 Ill. App. 261, a mandatory injunction was sustained which required an electric light company to remove its poles and wires from the streets where the license had expired, notwithstanding the fact that the electric light company had been furnishing to the city electric power to operate its water pump, and had made other arrangements to continue business.

The question is whether the allegations of the bill are sufficient to require appellee to answer. The bill alleges that appellee was a municipal corporation; that appellee was a private individual and without leave, compensation or license, strung wires across a public street for the purpose of carrying electric current from his garage to light his residence; that such wires are a menace to the public and a continuing nuisance; that a demand had been made upon him

to remove them; and that he refuses to comply with such demand. Under the authorities cited the allegations of the bill are sufficient to require an answer and the chancellor improperly sustained the demurrer.

We think it is unnecessary to consider the ordinance attached to the bill. According to the bill appellee was a trespasser and maintained a nuisance which was a menace to the public safety, and it was not necessary for the Village to pass an ordinance and make a demand before proceeding by injunction to abate the evil.

Appellee contends that appellant had an adequate remedy at law; that in cases of this kind equity jurisdiction should be exercised with caution and only in extreme cases, at least after the question of a nuisance has first been settled at law, and if there is any substantial dispute as to the facts or the law, a trial at law will be required before equity will intervene. This question was before this court in *Fletcher v. Town of Lisbon*, 222 Ill. App. 525. In that case we quoted the rule as announced in *City of Pana v. Central Washed Coal Co.* 260 Ill. 111, as follows:- "The general rule formerly strictly enforced was, that a court of equity would not interfere to restrain a nuisance unless the right so to do was first established in a court of law; but this rule has been somewhat relaxed in modern times and when the case is clear, so as to be free from substantial doubt as to the right to relief, or it is evident that a nuisance per se exists, equitable relief may be granted without first resorting to an action at law." To the same effect are *Oehler v. Levy* 234 Ill. 595; *Wente v. Commonwealth Fuel Co.* 232 id. 526; *Deaconess Home and Hospital v. Bontjes* 207 id. 553; *People v. Bushnell*, 186 Ill. App. 229.) The case as stated by appellant in its bill is sufficient to

to remove them; and that he refused to comply with such demand. Under the authorities cited the allegations of the bill are sufficient to require an answer and the chancellor improperly sustained the demurrer.

We think it is unnecessary to consider the ordinance attached to the bill. According to the bill, the appellant and respondent maintained a nuisance which was a menace to the public safety, and it was not necessary for the Village to pass an ordinance and make a demand before proceeding by injunction to abate the evil.

The appellant contends that appellant had an adequate remedy at law; that in cases of this kind equity jurisdiction should be exercised with caution and only in extreme cases, at least after the question of a nuisance has first been settled at law, and if there is any substantial dispute as to the facts of the law, a trial at law will be required before equity will interfere. This question was before this court in Fletcher v. Town of Lisbon, 222 Ill. App. 525. In that case we quoted the rule as announced in City of Evans v. Central Washed Coal Co., 220 Ill. Ill., as follows: "The general rule formerly strictly enforced was, that a court of equity would not interfere to restrain a nuisance unless the right so to do was first established in a court of law; but this rule has been somewhat relaxed in modern times and when the case is clear, so as to be free from substantial doubt as to the right to relief, or if it is evident that a nuisance yet exists, equitable relief may be granted without first resorting to an action at law." To the same effect are Gehler v. Levy, 234 Ill. 395; Wente v. Commonwealth Tel. Co., 232 Ill. 526; Des Moines Home and Hospital v. Montjoy, 207 Ill. 523; People v. Bushnell, 186 Ill. App. 229. The case as stated by appellant in its bill is sufficient in

to bring appellee within the rule above announced so as to give equity jurisdiction.

The decree will be reversed and the cause remanded with directions to overrule the demurrer to the bill.

Reversed and remanded with directions.

to bring a motion which the Court has granted to the
Court.

The Court will be satisfied with the motion.

with the motion to grant the motion to the Court.

reversed and remanded with interest.

THE COURT:

THE COURT:

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THE COURT:

THE COURT:

THE COURT:

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THE COURT:

THE COURT:

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS I. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

Received of the Treasurer of the State of New York

the sum of \$100.00

for the year 1881

in full for the year 1881

and April

609/a 701
AT A TERM OF THE APPELLATE COURT,

245 I.A. 642⁴⁵

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 29 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

TERM OF THE CIRCUIT COURT

It is Ordered on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
for the Second District of the State of Illinois:

Hon. THOMAS M. TETT, Presiding Justice.

NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

RECORDED, 1927, 41-10-27

Legris Trust and Savings Bank,	:	
a corporation, and Eugene Granger,	:	
Appellants,	:	Appeal from the
v.	:	County Court of
Farmers' Elevator Company, a	:	Kankakee County.
corporation,	:	
Appellee.	:	

Jones J:

There was a trial of the rights of property in the county court of Kankakee County, under Section 70, Chapter 77 of the Revised Statutes, to determine the ownership of one half of about 3000 bushels of corn. This half is claimed by Legris Trust and Savings Bank under a chattel mortgage and bill of sale from Arthur Granger, the landlord, and is also claimed by appellee, Farmers' Elevator Company, under an execution in its favor, against Arthur Granger, which execution was levied on said half of the corn as the property of Arthur Granger. The other one-half of the corn is claimed by Eugene Granger, the tenant. There was a trial by jury, at the close of the evidence on behalf of appellants; the court directed a verdict in favor of appellee; and this appeal was prosecuted.

Arthur Granger and Eugene Granger are brothers and each owned and resided on his respective farm in Kankakee County. On March 1, 1926, a verbal lease was made by which Eugene leased the farm of Arthur, at \$8.00 per acre for hay land, and one-half of all grain raised. Eugene testified that he was to plant, shuck and shell corn at his own expense, deliver it to the elevator when he got ready, and the crop was not to be divided until it was so delivered. Arthur continued to occupy

Appeal from the
County Court of
Kankakee County.

v.
Farmers' Elevator Company, a
corporation,
Appellees.

the dwelling house on his farm until June, 1926. He helped Eugene put in the corn and some of the oats for which labor he received no pay. When the corn matured it was shucked by Eugene Granger and placed in cribs on the leased premises and has never been delivered at the elevator.

On December 5, 1924, Arthur and his wife executed a note for \$4500 payable "to the order of ourselves", which note was secured by a trust deed on his land, and was endorsed on the back by the makers. Appellant, Legris Trust and Savings Bank, claims to be the owner of this note and trust deed and that there is over two years' interest due thereon.

The trust deed was subject to two prior mortgages. As additional collateral security for indebtedness secured by the trust deed, the Bank took a bill of sale and chattel mortgage from Arthur on one-half of the 3000 bushels of corn in the crib on the leased premises. On October 15, 1926 he gave a judgment note for \$5,000 to T. A. Legris, and a chattel mortgage to secure it. The mortgage was dated October 15, 1926, acknowledged November 5, 1926 before the clerk of the municipal court of Chicago, where Arthur then lived, and filed for record in the recorder's office of Kankakee County November 27, 1926. The bank now claims to be the holder of the said note and mortgage. On December 4, 1926, Arthur acknowledged a bill of sale for the corn in question to Thomas A. Legris. No assignment of the bill of sale appears in evidence, but Legris testified he had assigned it to the bank.

On December 21, 1926, appellants served a written notice on the sheriff of Kankakee County reciting that the corn in question, which the sheriff had levied upon pursuant to an execution dated December 15, 1926, in favor of appellee, against Arthur Granger is the property of the Legris Trust and Savings

the dwelling house on his farm until June, 1926. He helped
Learis out in the corn and some of the oats for which labor he
received no pay. When the corn matured it was shaken by
Learis and placed in cribs on the leased premises and
has never been delivered at the elevator.

On December 5, 1924, Arthur and his wife executed a
note for \$4500 payable "to the order of ourselves", which note
was secured by a trust deed on his land, and was endorsed on
the back by the makers. Appellant, Learis Trust and Savings
Bank, claims to be the owner of this note and trust deed and
that there is over two years' interest due thereon.
The trust deed was subject to two prior mortgages.

As additional collateral security for indebtedness secured by
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mortgage from Arthur on one-half of the 3000 bushels of corn
in the crib on the leased premises. On October 15, 1926 he
gave a judgment note for \$5,000 to T. A. Learis, and a chattel
mortgage to secure it. The mortgage was dated October 15, 1926,
and was filed November 5, 1926 before the clerk of the municipal
court of Chicago, where Arthur then lived, and filed for record
in the recorder's office of Kane County November 27, 1926.
The bank now claims to be the holder of the said note and
mortgage. On December 4, 1926, Arthur acknowledged a bill of
sale for the corn in question to Thomas A. Learis. No assignment
of the bill of sale appears in evidence, but Learis testified he
had assigned it to the bank.

On December 21, 1926, appellant served a written
notice on the sheriff of Kane County reciting that the corn
in question, which the bank had levied upon, was
seized and sold December 15, 1926, in favor of appellant, and
Arthur claims is the property of the bank.

Bank by virtue of the above mentioned chattel mortgage, and also that it is the property of Eugene Granger. The notice demanded that the sheriff turn over the property to Louis N. Legris, as agent and attorney in fact for appellants, or replevin would be brought against him.

The question presented for review is whether or not the court properly directed a verdict for appellee. The only property in controversy is the one-half of the corn which was the share of Arthur Granger. Although Eugene Granger is a party to the proceeding, the title to his one-half of the corn is not in controversy. Under the notice to the sheriff the bank based its title to the corn solely upon the chattel mortgage, but the case was tried upon the theory that the bank was the owner of the property by virtue of both the chattel mortgage and the bill of sale with possession thereunder prior to the date of the execution of appellee.

There is a dispute as to whether Eugene Granger was a tenant of his brother or whether they were tenants in common in the property in question. The only circumstance which even tends to show that they were tenants in common is that Arthur Granger occupied the house on the premises from March until June and that he helped to put in the corn and oats, for which he got no pay. We think, however, the evidence clearly shows that the relation of landlord and tenant existed.

If that relation did exist, the next inquiry is, in whom was the title to the property at the time the chattel mortgage and bill of sale were executed? Eugene Granger testified that his brother was to have one-half of the corn crop when it was delivered at the elevator. Where there is a leasing for a share of the crop raised and it is to be divided after the same is gathered, the exclusive title to the whole

Bank by virtue of the above mentioned chattel mortgage, and that that it is the property of Eugene Granger. The notice is given that the sheriff turn over the property to Louis W. Lewis, as agent and attorney in fact for appellants, or receiver would be brought against him.

The question presented for review is whether or not the court properly directed a verdict for appellee. The only property in controversy is the one-half of the corn which was the share of Arthur Granger. Although Eugene Granger is a party to the proceeding, the title to his one-half of the corn is not in controversy. Under the notice to the sheriff the bank passed its title to the corn solely upon the chattel mortgage, but the case was tried upon the theory that the bank was the owner of the property by virtue of both the chattel mortgage and the bill of sale with possession transferred prior to the date of the execution of appellee.

There is a dispute as to whether Eugene Granger was a tenant of his brother or whether they were tenants in common in the property in question. The only circumstance which even tends to show that they were tenants in common is that Arthur Granger occupied the house on the premises from March until June and that he helped to put in the corn and oats, for which he did not pay. We think, however, the evidence clearly shows that the relation of landlord and tenant existed.

If that relation did exist, the next inquiry is, what was the title to the property at the time the chattel mortgage and bill of sale were executed? It was contended that his brother was to have one-half of the corn crop when it was delivered at the elevator. Where there is a finding for a share of the crop raised and it is to be divided after the same is delivered, the relation of landlord and tenant

crop raised is in the tenant until it is divided and possession given. (Sargent v. Courrier, 66 Ill. 245; Dixon v. Niccolls, 39 id. 372; Grotefendt v. Schlaeppi 213 Ill. App. 436.) In the first case cited a levy was made against the tenant before the grain was divided and it was held that the landlord could not maintain replevin before a division had been made. If the exclusive title to all the corn was in Eugene Granger at the time the chattel mortgage and bill of sale were executed, then the bank took no title to the property because no division of the corn had been made.

But, even if the title to the property was in Arthur Granger, and not Eugene, at the time the bill of sale and chattel mortgage were executed, the bank's claim under its chattel mortgage was not good as against the rights of appellee. At the time the chattel mortgage was executed, Arthur lived in Chicago. The mortgage was acknowledged there and filed for record in Kankakee County. Sections 1, 2 and 4, Chapter 95 of the Revised Statutes require a mortgage to be recorded in the county where the mortgagor resides. This statute was not complied with; therefore the mortgage was not good except between the parties unless possession was taken of the property. (Rapp v. Rush 96 Ill. App. 356). The bank claims to have taken possession by placing Eugene Granger in charge and ordering him to husk the corn. The taking possession of property which is sufficient to pass title as against creditors must be an actual, substantial, visible and continuous change of possession, such as to apprise those accustomed to deal with the owner that the ownership has changed. It is not sufficient to return the goods to the former owner, or make the agent or hired hand or tenant of the former owner the custodian. (Martin v. Duncan, 156 Ill. 274; Ticknor

every interest in the land until it is divided and possession
given. (See *Harmon v. Gouvier*, 66 Ill. 146; *Dixon v. Wisconsin*,
111 Ill. 172; *Professor v. Schmeppel*, 213 Ill. App. 438.) In the
first case cited a levy was made against the tenant before the
land was divided and it was held that the tenant was not
entitled to relief before a division had been made. In the
exclusive title to all the corn was in Eugene, and as the
title the chattel mortgage and bill of sale was executed, the
bank took no title to the property because no division of the
corn had been made.
But, even if the title to the property was in Arthur
Granger, and not Eugene, at the time the bill of sale and chattel
mortgage were executed, the bank's claim under its chattel
mortgage was not good as against the rights of appellee. At the
time the chattel mortgage was executed, Arthur lived in Chicago.
The mortgage was acknowledged there and filed for record in
LaSalle County. Sections 1, 2 and 4, Chapter 92 of the Revised
Statutes require a mortgage to be recorded in the county where
the mortgagor resides. This statute was not complied with;
therefore the mortgage was not good except between the parties.
When possession was taken of the property. (*Hagg v. Hagg*, 96
Ill. App. 356.) The bank claims to have taken possession by
Edward Eugene Granger in charge and ordering him to break the
corn. The taking possession of property which is sufficient
to pass title as against creditors must be an actual, substantial,
visible and continuous change of possession, such as to apprise
those accustomed to deal with the owner that the ownership has
passed. It is not sufficient to make the goods in the hands
of one, or make the agent or clerk of the owner to be the
owner and custodian. (*Harmon v. Gouvier*, 66 Ill. 146; *Dixon v. Wisconsin*,
111 Ill. 172; *Professor v. Schmeppel*, 213 Ill. App. 438.)

v. McClelland, 84 id. 471; Watkins v. Dunbar, 232 Ill. App. 1; Byerly v. Jones 184 id. 314; Martin v. Sexton 72 id. 395; Richards v. Matson, 51 id. 530.) The evidence does not show such a taking of possession as to vest title in the bank either under the chattel mortgage or the bill of sale.

Section 5, Chapter 95, of the Revised Statutes provides that a chattel mortgage shall be recorded within ten days of the date of its execution, and if it is not so recorded it shall be fraudulent and void as to creditors. This chattel mortgage was dated October 15, 1926; it was acknowledged November 5, 1926; it never was filed for record in Cook County, but was filed for record in Kankakee County on November 27, 1926. It was therefore fraudulent and void as to creditors upon its face, and as possession was not taken of the property mortgaged it was not in force and effect as against any execution which might be levied. The bank and Eugene Granger were not such joint owners of the property as entitled them to maintain the action.

For the reasons indicated, the court properly directed a verdict in favor of appellee, and the judgment will be affirmed.

Judgment affirmed.

v. McGinnis, 84 id. 471; Watkins v. Danner, 232 Ill. App. 11
Harty v. Jones 184 id. 314; Martin v. Sexton 72 id. 395; Richards
v. Jackson, 71 id. 330. The evidence does not show such a taking
of possession as to vest title in the bank either under the chattel
mortgage or the bill of sale.

Section 4, Chapter 95, of the Revised Statutes provides

that a chattel mortgage shall be recorded within ten days of the
date of its execution, and if it is not so recorded it shall be
invalid and void as to creditors. This chattel mortgage was
dated October 15, 1924; it was acknowledged November 5, 1924;
it never was filed nor record in Cook County, and was filed for
record in Hamilton County on November 27, 1925. It was therefore
invalid and void as to creditors and all others, and no person
also was not taken of the property mortgaged it was not to have
and effect as against any execution which might be levied. The
bank and Higgins' assignors were not such joint owners of the property
as entitled them to maintain the action.

For the reasons indicated, the court properly directed
a verdict in favor of appellee, and the judgment will be affirmed.

FOR THE COURT, THIS DAY OF

RECORDED AND INDEXED

ON THIS DAY OF

CLERK

IN THE COURT OF

AND THE COUNTY OF

AND THE COUNTY OF

IT IS NOTED

ON THIS DAY OF

AND THE COUNTY OF

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS I. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

THE UNIVERSITY OF CHICAGO
LIBRARY
IN LITERATURE
AND ARTS

6092a
AT A TERM OF THE APPELLATE COURT,

2451A.643 #1

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

FRANKLIN H. BOGGS

Hon. ~~AUGUSTUS A. FARLOW~~, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

APR 8 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

APPROPRIATE FOR THE
S. 1000
on Tuesday, the 11th day of April, 1900,
at of our Lord one thousand nine hundred and twenty-eight
and for the
of Illinois:

REMEMBERED, that subscribed to wit: On
927 the opinion of the Court was filed in the
ice of said Court, in the words and figures

MARTHA K. CONSIDINE, :
 APPELLEE, :
 v. :
 JOHN NOTTOLINI, :
 APPELLANT, :

APPEAL FROM THE
 CIRCUIT COURT OF
 KANE COUNTY.

Jones, J:

The plaintiff, Martha K. Considine, obtained a judgment for \$500 in the circuit court of Kane County against appellant, John Nottolini, in an action on the case, and an appeal has been prosecuted to this court.

Mrs. Considine and her husband lived on the east side of Second Street in Geneva. Nottolini, the defendant, lived directly across the street. There was a driveway into each of the premises and almost on a line with each other. It was about 150 feet from the garage in the rear of defendant's house to his front sidewalk; and it was about 100 feet from this sidewalk to plaintiff's front porch. The street was 60 to 75 feet wide. There was shrubbery next to defendant's front walk and there was also some around plaintiff's front porch. About 10 o'clock on the morning of October 19, 1925, Mrs. Considine was seated in the living room near a window with some sewing in her lap and was reading. She heard a noise, looked up and saw a truck on the west side of the street backing^{at}/full speed towards her house. She was frightened and started to run across the room. She fell over a chair and bruised her left leg above the knee. The truck struck and considerably damaged the front porch. The truck belonged to the defendant and was being driven by his servant. The driver testified that on the morning before he took the truck out, he looked over the engine, oiled and

APPEAL FROM THE
CIRCUIT COURT OF
KANE COUNTY.

WILLIAM K. CONSIDINE,
Plaintiff,
v.
JOHN WOTOLINI,
Defendant.

JAMES H. JONES, Jr.,

The plaintiff, William K. Considerine, obtained a judgment for \$500 in the circuit court of Kane County against defendant, John Wotolini, in an action on the case, and an appeal has been prosecuted to this court.

Mrs. Considerine and her husband lived on the east side of Second Street in Geneva. Wotolini, the defendant, lived directly across the street. There was a driveway into each of the premises and almost on a line with each other. It was about 150 feet from the garage in the rear of defendant's house to his front sidewalk; and it was about 100 feet from this sidewalk to plaintiff's front porch. The street was 60 to 75 feet wide. There was shrubbery next to defendant's front walk and there was also some around plaintiff's front porch. About 10 o'clock on the morning of October 19, 1935, Mrs. Considerine was seated in the living room near a window with some sewing in her lap and was reading. She heard a noise, looked up and saw a truck on the west side of the street backing full speed towards her house. She was frightened and started to run across the room. She fell over a chair and bruised her left leg above the knee. The truck struck and considerably damaged the front porch. The truck belonged to the defendant and was driven by his servant. The driver testified that on the morning before he took the truck out, he looked over the engine, oiled and

greased the truck, put in gas in the tank and backed out of the garage. He slowed down at the sidewalk in order to look out for people who might be passing, and as he backed across the sidewalk his speed ranged from ten to twenty miles per hour. He was using the foot accelerator and it was working all right. As the truck went over the sidewalk the driver increased the speed and as he did so the accelerator stuck and the truck further increased its speed. His foot slipped off of the clutch; he tried to throw the car into neutral, but by the time he got his foot back on the clutch, the truck had struck the porch. The plaintiff then went to the front window and afterwards out into the yard to see if the driver was hurt, where it is claimed she talked with the driver relative to injuring her shrubbery. She returned to the house and called her husband by telephone.

According to her testimony she spent the rest of the day lying down suffering from a severe headache. Dr. Scott was called the next morning and found her in a condition of extreme shock. He called the next day and on October 22, Dr. Carpenter was called. Mrs. Considine was removed to a hospital and remained there four weeks during which time she suffered from severe headaches, was highly nervous, had hallucinations, and high blood pressure and pulse, and after she went home from the hospital she was weak and spent considerable time in bed. There was evidence that prior to this accident she had been in good health, except that she was in a hospital for about four weeks when her daughter was born 17 years before. She had always done her own housework including her washing and had helped her husband build their house.

At the close of plaintiff's evidence and at the close of all of the evidence, the defendant moved to direct a verdict in his favor. These motions were overruled and he insists that under authority of *Braun v. Craven*, 175 Ill. 401, they

crossed the truck, but in gas in the tank and backed out of the garage. He slowed down at the sidewalk in order to look out for people who might be passing, and as he backed across the sidewalk his speed ranged from ten to twenty miles per hour. He was using the foot accelerator and it was working all right. As the truck went over the sidewalk the driver increased the speed and as he did so the accelerator stuck and the truck further increased its speed. His foot slipped off of the clutch; he tried to throw the car into neutral, but by the time he got his foot back on the clutch, the truck had started the porch. The plaintiff then went to the front window and afterwards out into the yard to see if the driver was hurt, where it is claimed she talked with the driver relative to injuring her husband. She returned to the house and called her husband by telephone.

According to her testimony she spent the rest of the day lying down suffering from a severe headache. Dr. Seibert was called the next morning and found her in a condition of extreme shock. He called the next day and on October 28, Dr. Carpenter was called. Mrs. Conditine was removed to a hospital and remained there four weeks during which time she suffered from severe headaches, was highly nervous, had hallucinations, and high blood pressure and pulse, and after she went home from the hospital she was weak and spent considerable time in bed. There was evidence that prior to this accident she had been in good health, except that she was in a hospital for about four weeks when her daughter was born 17 years before. She had always done her own housework including her washing and had helped her husband build their house.

At the close of plaintiff's evidence and at the close of all of the evidence, the defendant moved to direct a verdict in his favor. These motions were overruled and he insists that under authority of *Brown v. Craven*, 175 Ill. 401, they

should have been allowed and a verdict directed for him. In the Braun case it was held that no liability exists for negligent acts which occasion fright or terror, unaccompanied by physical injury, even though a nervous shock and subsequent illness result, where the acts of negligence are not of such a character as might reasonably be expected to have the effect produced. It was further held that terror or fright, even if it results in a nervous shock, does not create a liability; and that on the grounds of public policy alone, having reference to the dangerous use to be made of such a cause of action, there is no liability. We recognize the rule as announced in that case, but we do not think it is applicable here because of the difference in the facts in the two cases. In the Braun case the defendant was the owner of the house in which the plaintiff lived. He went to this house to collect his rent as he had a right to do. While he was there a dispute arose because the plaintiff was about to remove from the premises. Defendant became excited, waved his arms, indulged in loud talk, made some threats, but offered no physical violence to the plaintiff. Her injury consisted entirely of fright, terror and nervous shock with no physical injury of any kind. Under these facts, after a review of many authorities, the rule was announced as above stated, and has been for many years the settled law of this state.

In the case at bar the facts are entirely different. The plaintiff was seated in her home. The defendant through his servant was a trespasser. The impact of his automobile with plaintiff's house was of such force that the floor boards in the porch were loosened and buckled; plastering in the house was cracked; some fruit jars in the basement were knocked from a shelf; the truck was wedged under the porch so that another car had to be used to pull it out; and the first rope used broke before the truck was freed. As a result of the defendant's

action, Mrs. Considine naturally became frightened and started to run to the rear of the house. She fell over a chair and received a physical injury which, under the evidence, we think was a direct result of the negligence of defendant's servant.

The declaration charges general negligence and avers that the great force and violence of the collision threw appellee into a state of nervous shock which resulted in a mental illness, and she suffered great sickness and was sick, disordered and so remained for a long space of time. Defendant in his brief and argument repeatedly calls our attention to the fact that the declaration alleges no physical violence and it therefore does not state a cause of action. It is possible that the declaration defectively stated the cause of action, but the defendant joined issue and did not demur.

Where there is a defect or omission in the pleading in form or substance which would have been fatal on demurrer, yet, if the issue joined is such as necessarily required proof of the facts defectively stated, or omitted, without which it cannot be presumed that the judge would direct, or the jury would give a verdict, such defect, imperfection, or omission is cured by verdict. (O'Rourke v. Sproul, 241 Ill. 576; Messenger v. Wendell, 211 Ill. App. 374; Watkins v. Bailey 217 id. 460.) The fact that the plaintiff received a physical injury ~~was~~ the direct result of plaintiff's negligence, took the case out of the operation of the rule announced in the Braun case; and it is of no consequence that the plaintiff testified that she did not believe that the injury to her leg was the cause of her nervousness and illness. The court properly refused to direct a verdict for appellant.

The court allowed the physician who examined plaintiff to relate what she told him with reference to the shock and nervous condition, and what caused it. We think the court was in error in admitting some of this testimony, but the record

action, Mrs. Connelley seriously became frightened and started to run to the rear of the house. She fell over a chair and received a physical injury which, under the evidence, we think was a direct result of the negligence of defendant's servant. The declaration charges general negligence and avers that the great force and violence of the collision threw against a state of nervous shock which resulted in a mental illness. It was further held that defendant was sick, disordered and so remained for a long space of time. Defendant in his brief and argument repeatedly calls our attention to the fact that the declaration alleges no physical violence and it therefore does not state a cause of action. It is possible that the declaration does not state the cause of action, but the defendant joined in the facts in the law and did not deny.

Where there is a defect or omission in the pleading in fact or in law which would have been fatal on demurrer, yet if the facts joined is such as necessarily required proof of the facts defectively stated, or omitted, without which it cannot be presumed that the jury would direct, or the jury would give a verdict, such defect, imperfection, or omission is cured by amendment. (O'Rourke v. Sprout, 241 Ill. 576; Messenger v. Hensell, 241 Ill. App. 874; Watkins v. Bailey 217 Ill. 460.) The fact that the plaintiff received a physical injury was the direct result of plaintiff's negligence, took the case out of the operation of the rule announced in the Burns case; and it is of no consequence that the plaintiff testified that she did not believe that the injury to her leg was the cause of her nervousness and illness. The court properly refused to direct a verdict for the plaintiff.

The court allowed the physician who examined plaintiff to state what she told him with reference to the shock and nervous condition, and what caused it. We think the court was in error in admitting some of this testimony, but the records

shows that it was, in the main, given without objection and that counsel for defendant cross-examined her as to such matters and also cross-examined the physician. For these reasons the defendant is in no position to urge his objections in this court. Other rulings on evidence are complained of. We have examined all of them, and have reached the conclusion that we would not be justified in reversing the judgment because of any error in them.

The 1st and 2nd instructions given on behalf of the plaintiff are not approved because they refer the jury to the declaration and do not inform them what it contains. Such instructions have been frequently criticised, but seldom held to constitute reversible error. The 3rd and 4th instructions state the rule of law with reference to the right of appellee to recover for pain and anguish. In view of what we have already said we do not think the court was in error in giving either of them. Defendant's refused instructions 4, 5, 6, 7, 8, and 9 were based upon the rule announced in the Braun case and under the facts in evidence were properly refused. The jury was fully instructed as to the law applicable to the facts in evidence.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

(The) of the State of Illinois and the people of the State of Illinois
do hereby certify that the foregoing is a true copy of the original
as it appears in my office.

In testimony whereof, I have hereunto set my hand
and Affirmative Seal at Springfield, Illinois, this 1st day of

1892.

John H. Smith, Clerk of the Court.

6094
AT A TERM OF THE APPELLATE COURT,

245 I.A. 643 #2

Begun and held at Ottawa, on Tuesday, the fifth day of April, in
the year of our Lord one thousand nine hundred and twenty-seven,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

FRANKLIN H. BOGGS

Hon. ~~AUGUSTUS A. PARLOW~~, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 29 1927 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

JONES, Thomas
J. BOON

THE UNIVERSITY OF CHICAGO PRESS

14 June, in the words and figures

C.D. KUKUK,	:	
Appellant,	:	
v.	:	Appeal from the
	:	Circuit Court of
WILLIS A. MARTIN,	:	La Salle County.
A. J. FOOTE,	:	
Appellees.	:	

JONES J:

Appellant, C. D. Kukuk, filed a bill in the Circuit Court of La Salle County against appellees, Willis A. Martin and A. J. Foote, to establish an equitable lien. There was a hearing before the chancellor; the bill was dismissed for want of equity, and this appeal followed.

The evidence shows that Charles C. Kelley lived on a farm east of Earlville, Illinois. He was engaged in farming, teaming and buying and selling livestock. In October, 1920, he purchased 108 hogs. They were shipped by railroad to Earlville to be paid for before delivery. Kelley had given a check to the purchaser but it was not honored by the bank on account of lack of funds, and the seller notified the railroad agent not to deliver the hogs until the check was made good. On October 6, 1920, Kelley applied to Kukuk to sign a note as surety for \$1500. Kukuk testified that Kelley said if appellant would sign the note, the hogs should belong to appellant; that Kelley would take them to his home, feed them, and when they were fat, appellant could sell them, pay the note out of the proceeds and turn the balance over to Kelley. The note was signed by appellant and the hogs were turned over to Kelley. Appellant is corroborated as to the terms of this contract by Alfred Leonard, an employee of Kelley. The shipment consisted of a mixed lot of various grades of

Appeal from the
District Court of
La Salle County.

C.D. WILSON,
Appellant,
v.
WILLIAM A. HARRIS,
A. J. FOSTER,
Appellees.

: 135555

The shipment consisted of a mixed lot of various grades of over to Kelley. Appellant is corroborated as to the terms of this contract by Alfred Leonard, an employee of Kelley. The note was signed by appellant and the hogs were turned out of the proceeds and turn the balance over to Kelley. and when they were fat, appellant could sell them, pay the appellant; that Kelley would take them to his home, feed them, appellant would sign the note, the hogs should belong to appellant would sign the note, the hogs should belong to appellant for \$1500. Kelley testified that Kelley said in October 6, 1930, Kelley applied to Kelley to sign a note to not to deliver the hogs until the check was cashed. On or last of funds, and the seller notified the railroad agent to the purchaser but it was not honored by the bank on account of late to be paid for before delivery. Kelley had given a check he purchased 108 hogs. They were shipped by railroad to Earl- tending and buying and selling livestock. In October, 1930, a farm east of Earlville, Illinois. He was engaged in farming. The evidence shows that Charles G. Kelley lived on

sows and pigs. Kelley had several pens on his farm where hogs of different kinds and grades were kept and these 108 hogs were placed in these various pens. During the next four or five months Kelley continued to buy, sell and ship hogs, shipping one and sometimes two carloads per week.

He was being hard pressed by his creditors, and on March 4, 1921, made an assignment of all of his property for the benefit of all of his creditors who might want to join therein. The assignment was to A. J. Foote, who was president of the Earlville National Bank, and to Willis A. Martin, who was president of the First National Bank of Earlville. Kelley turned over to his assignees and trustees all of his property including 85 hogs. Kukuk testified that in April, 1921, a day or two before the sale of Kelley's property by appellees, he went to the Earlville National Bank to see Foote. Foote was not there, but he talked with W. C. Gilmore, the cashier of the bank, and told Gilmore that he had a claim on these hogs. He further testified that Gilmore told him to let the sale go on without stirring up any of the creditors; that he (Gilmore) would look after the interest of appellant and would see that everything was made all right; that he would assure appellant he would get 80% of his claim; that this method would be cheaper than collecting it by law; that Gilmore said "I am looking after your interest, I am looking after my friends, and I don't care if the rest never get any money". Gilmore was not called as a witness. His bank was one of the creditors, and his failure to testify is not explained.

Appellant further testified that as he left the bank after this talk with Gilmore, he met Foote, the president of the bank, and one of the assignees, on the sidewalk just outside of the bank. He related to Foote his con-

hogs and pigs. Kelley had several pens on his farm where hogs of different kinds and grades were kept and these 108 hogs were placed in these various pens. Kelley had four or five months Kelley continued to buy, sell and ship hogs, shipping one and sometimes two carloads per week.

He was being hard pressed by his creditors, and on March 4, 1921, made an assignment of all of his property for the benefit of all of his creditors who might want to join therein. The assignment was to A. J. Toote, who was president of the Knoxville National Bank, and to Willis A.

Martin, who was president of the First National Bank of Knoxville. Kelley turned over to his assignees and trustees all of his property including 35 hogs. Kelley testified that in April, 1921, a day or two before the sale of Kelley's

property by appellees, he went to the Knoxville National Bank to see Toote. Toote was not there, but he talked with W. C. Gilmore, the cashier of the bank, and told Gilmore that he had a claim on these hogs. He further testified that

Gilmore told him to let the sale go on without stirring up any of the creditors; that he (Gilmore) would look after the interest of appellant and would see that everything was made all right; that he would assure appellant he would get 80% of his claim; that this method would be cheaper than

collecting it by law; that Gilmore said "I am looking after your interest, I am looking after my friends, and I don't care if the rest never get any money". Gilmore was not called as a witness. His bank was one of the creditors, and his failure to testify is not explained.

The next Appellant further testified that as he left the bank after this talk with Gilmore, he met Toote, the president of the bank, and one of the assignees, on the sidewalk just outside of the bank. He related to Toote his con-

versation with Gilmore, and Foote said "Yes that is the best thing"; that Foote asked him to sign the assignment agreement as a creditor of Kelley but he refused to do it, and that in a prior conversation with Foote, he told Foote that the hogs were his. Foote in his testimony denied that he had any conversation with appellant in April, 1921, at the time and place stated by appellant. He testified that the first time he had a conversation with appellant about the hogs was in January, 1922, after the sale; that in that conversation Kukuk claimed that the hogs were his; that prior to that time he did not know he made any claim to the hogs, and that he (Foote) said to appellant "Why didn't you make your claim before and we would have taken care of it". Appellee, Martin, testified "We did take over the hogs from Mr. Kelley, 85. They were sold at the sale of the 6th of April, 1921. Trustee sale, the sale we had of the Kelley ~~property~~". "The hogs were all sold to C. C. Kelley, in one bunch".

The hogs were sold on April 6, 1921 and Gilmore was a clerk of the sale a part of the time. Alfred Leonard, ^{had} who/worked for Kelley, testified that at the sale just before the hogs were sold, Kelley said "there are some of the Kukuk hogs, haven't they done fine?" It is not clear what the hogs brought at the sale; the evidence on behalf of appellant is that the 85 head sold for \$22 apiece or a total of \$1870. While the evidence on behalf of appellees is that 50 hogs sold for \$1042.50 and 35 sold for \$367.20, or a total of \$1409.70.

On January 5, 1922, the Farmer's State Bank of Belvidere obtained a judgment by confession on the \$1500 note signed by Kelley and appellant. Later Kelley died and appellant satisfied the judgment and costs by paying \$1577.43. He also paid \$116.00 interest prior to the judgment.

... with ... and ... said "Yes that is the best ...
... said ... to sign the assignment agreement ...
... said ... but he refused to do it, and that in ...
... with ... he told ... that the boys ...
... said that he had any con- ...
... with ... in April, 1931, at the time and ...
... He testified that the first time ...
... with ... about the boys was in ...
... after the sale; that in that conversation ...
... that the boys were his; that prior to that ...
... he made any claim to the boys, and that ...
... "Why didn't you make your claim ...
... have taken care of it". Appellee, ...
... "We did take over the boys from Mr. Kelley, 83 ...
... of the 6th of April, 1931. ...
... of the Kelley property". The boys were ...
... in one bunch".
... on April 6, 1931 and Gilmore ...
... of the sale at the time. Alfred Leonard, ...
... for Kelley, testified that at the sale just before ...
... Kelley said "there are some of the Kelley ...
... It is not clear what the boys ...
... the evidence on behalf of appellant is ...
... for \$22 apiece or a total of \$1870.
... of appellee is that 30 boys sold ...
... for \$287.50, or a total of \$1409.70.
... January 5, 1932, the Farmer's State Bank of ...
... obtained a judgment by confession on the \$1500 note ...
... and appellant. Later Kelley died and appellant ...
... by paying \$157.43. He also ...
... \$113.33 ...

The question in this case is whether under the evidence appellant had an equitable lien on the hogs. The evidence shows that when these 108 hogs were shipped to Kelley he could not pay for them and could not get possession of them until he pay for them. He applied to appellant for financial assistance and appellant signed a note for \$1500. There is no dispute as to the conditions under which the note was signed, namely, that the title to the hogs was to be in appellant, and when they were sold he was to make the sale and pay the note out of the proceeds. An equitable lien arises either out of an antecedent or underlying contract, which deals with some specific property, or it arises by implication from the conduct or dealings of the parties. It may be evidenced by a parol agreement. (37 Corpus Juris, pp 315, 319.) It is a lien which a court of chancery recognizes as distinct from legal rights and it may be enforced regardless of the rights which the applicant may have in a court of law, (Tinsley v. Durfey, 39 Ill. App. 240.) and is not conditioned upon the possession of the specific property charged with the payment of the debt. (Union Trust Co. v. Trumbull, 137 Ill. 146.)

The assignment of the property by Kelley to appellees was not for the benefit of all of Kelley's creditors, but was only for the benefit of those who saw fit to join in the agreement. Under such an assignment the assignees took as volunteers, subject to all liens, equities and burdens to which the property was subject. (Union Trust Company v. Trumbull, supra.)

At the time of this assignment to appellees, Kukuk not only had a claim upon the 108 hogs originally shipped, but the evidence tends to show that before the sale, appellees had knowledge of such claim. The mere fact that Gilmore did not deny the statement of appellant as to notice strongly

The question in this case is whether under the evidence appellant had an equitable lien on the hogs. The evidence shows that when these 108 hogs were shipped to Kelley he could not pay for them and could not get possession of them until he paid for them. He applied to appellant for financial assistance and appellant signed a note for \$1500. There is no dispute as to the conditions under which the note was signed, namely, that the title to the hogs was to be in appellant, and when they were sold he was to make the sale and pay the note out of the proceeds. An equitable lien arises either out of an antecedent or underlying contract, which arises with some specific property, or it arises by implication from the contract or deed of the parties. It may be evidenced by a parol agreement. (27 C. J. 219, 220.) It is a lien which a court of equity recognizes as distinct from legal rights and it may be enforced regardless of the rights which the appellant may have in a court of law. (Tinsley v. Dury, 23 Ill. App. 240.) and is not conditioned upon the possession of the specific property charged with the payment of the debt. (Union Trust Co. v. Trembly, 137 Ill. 146.)

The assignment of the property by Kelley to appellees was not for the benefit of all of Kelley's creditors, but was only for the benefit of those who saw fit to join in the agreement. Under such an assignment the assignees took as volunteers, subject to all liens, equities and claims to which the property was subject. (Union Trust Company v. Trembly, supra.)

At the time of this assignment to appellees, Kelley was not only a debtor but also a creditor, and the evidence tends to show that before the sale, appellees had knowledge of such claim. The mere fact that appellees did not deny the existence of such claim as to the hogs is not

tends to corroborate appellant that notice was given. Weak evidence sometimes becomes strong against a person, who has power to contradict it, but does not do so. (East St. Louis Ry. Co. v. Altgen, 210 Ill. 213; Central Stock and Grain Exchange v. Board of Trade, 196 id. 396.) Not only did appellees have notice but Gilmore assured appellant his interests would be looked after if he would not interfere with the sale. Foote told appellant in January that if appellant had made his claim before that time they would have taken care of it. Under all this evidence we think it not only appears that appellant had a lien, but that appellees knew he had it. Notwithstanding this knowledge, they proceeded to sell the 85 hogs and Kelley bought them.

Appellees now insist that these 108 hogs were mixed and mingled with other hogs, and at least 23 of them were sold, so that identification of the specific hogs is impossible and hence a lien cannot be established. In Union Trust Co. v. Trumbull, supra, it was held that in order to support an equitable lien there must be an ascertainment and identification of the property which is the subject of the lien; but only such an identification is required as is essential to an enforcement of the lien, and an identification can be made as well by an application of the equitable principle of estoppel as in any other way. In consideration of all of the evidence in the case and applying the doctrine of equitable estoppel, the identity of the 85 hogs was sufficiently established to entitle appellee to enforce his equitable lien.

The chancellor was in error in dismissing the bill for want of equity, and the decree will be reversed and the cause remanded with directions to enter a decree for an equitable lien as prayed in the bill.

...that the appellant had notice was given.
...person, who has
...but does not do so. (East St. Louis
...SIO III. SIO; Central Stock and Grain
...1964. 1964. 1964.) Not only did appellees
...appellant his interests would be
...would not interfere with the sale. Butte
...January, that if appellant had made his claim
...they would have been aware of it. Under all
...this evidence as to the fact that appellees knew
...to sell the 88 hogs and Kelly bought
...by the appellees from the appellant.

...now insist that these 108 hogs were mixed
...and at least 88 of them were sold.
...of the specific hogs is impossible and
...cannot be established. In Union Trust Co. v.
...it was held that in order to support an
...there must be an ascertainment and identification
...of the property which is the subject of the lien; not only such
...is required as is essential to an enforcement
...and an identification can be made as well by an
...of the equitable principle of estoppel as in any
...In consideration of all of the evidence in the case
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The chancellor was in error in dismissing the bill for
want of equity, and the decree will be reversed and the cause
...with directions to enter a decree for an equitable lien
...in the bill.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

1000

1000

Handwritten: Han L. D. Jager - Trial Judge
Ginnis & McGinnis Appellant.
J. J. Brenholt. Appellee

245 I.A. 643 #3

Term No. 22

Agenda No. 10

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

March Term A. D. 1921

FILED

NOV 10 1921

THE MIFFLINBURG BANK,
Appellant.

vs.

THOMAS MORFOOT,
Appellee.

Appeal from
City Court
of Alton

Robert B. Noel
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Opinion by Higbee, P. J.

Appellant brought this suit in assumpsit to recover the amount claimed to be due on two promissory notes dated May 5, 1919, each for the sum of \$275.00 payable to the order of the Federal Stock Food Company; one due July 1, 1919 and the other August 1, 1919 and both signed by appellee and made payable at Alton Banking and Trust Company of Alton, Illinois.

The declaration consisted of a special count on the two notes and the common counts. The special count alleged among other things that said notes were assigned to appellant before maturity for a valuable consideration; that they were presented to appellee at maturity and he refused to pay the same or any part thereof. Appellee filed a plea of general issue, and notice of special matter of defense to the effect that one Samuel Strickler as the agent of the Federal Stock Food Company, secured appellee's signature to the notes in question by fraud and circumvention, and that the notes were assigned to appellant after notice to appellant of such fraud and circumvention. The alleged fraud stated in such notice and testified to by appellee on the trial was, that appellee at the solicitation of Strickler met him in the city of St. Louis, and agreed to become the agent of The Federal Stock Food Company and signed two papers that Strickler said were duplicate "receipts or acknowledgements of his agency"; and that Strickler so held his hands over the papers as appellee signed them that he did not see what was on them. A trial was had resulting in a verdict and judgment in favor of appellee.

In his deposition appellant's cashier testified the notes came into possession of appellant June 3, 1919, that the proceeds were placed to the credit of the Federal Stock Food Company and were checked out by it in the ordinary course of business. There is no evidence in the record that appellant did not become the owner of the note in question before maturity and in the absence of such proof it will be presumed appellant purchased the notes before maturity for value in the due course of business and that it was an innocent holder. (Clarke vs. Newton, 235 Ill. 530; Nagle vs. Schnadt, 239 id. 595; 8 Corpus Juris 980). Appellee further contends he had notified appellant of the alleged fraud in the execution of the notes before the bank became



the owner of them. The notice claimed to have been given is a letter written at request of appellee by the Vice President of the Citizens National Bank of Alton, to appellant under date of May 6, 1919 asking information regarding the "financial standing and reputation of the Federal Stock Food Company." This letter did not mention appellee nor the notes in question, and cannot in any way be considered as a notice to appellant that appellee had a defense to such notes. We are also of opinion that there was not sufficient proof to constitute fraud, in the execution of the note as that term is contemplated by the statute. Appellee testified he could read and that there was no reason why he couldn't have taken up the papers and seen what was in them, but that he did not take them up and read them before signing the notes nor did he ask to have them read to him. He does not contend that he was fraudulently led to affix his signature to the papers he signed, but that he was fraudulently informed as to the legal effect of the same. By exercising the ordinary precaution of reading the instruments before he signed them, he could readily have learned they were notes and not having exercised this ordinary prudence and caution he is bound thereby as against an endorsee before maturity and without notice. (*Homes vs. Hale*, 71 Ill. 552; *Leach vs. Nichols*, 55 Ill. 273; *Latham vs. Smith* 45 Ill. 25).

Several of the instructions given in behalf of appellee are erroneous. Instruction No. 2 was to the effect that if the jury believed from the evidence appellant had no interest in the notes, but that the suit was brought to assist the Federal Stock Food Company in perpetrating a fraud upon appellee they should find appellee not guilty. Instruction No. 5 told the jury that if they believed from the evidence appellant confederated with one Strickler to perpetrate a fraud upon appellee in securing the execution of the notes, they should find for appellee. The proof in no way connects appellant with the facts and circumstances which appellee claims constitutes fraud and circumvention. There was no evidence whatever upon which to base either of these instructions and it was error to give them. Instruction No. 6 was as follows: "The court instructs the jury that the law is, that a note given to a corporation cannot be assigned unless by an endorsement thereon made by some officer of the corporation, and if the jury believe from the evidence that the endorsement made upon the alleged notes, offered in evidence is not made by an officer of the Federal Stock Food Company, then the jury will find for the defendant." The evidence in this case shows clearly that The Federal Stock Food Company was not a corporation, but that Samuel K. Strickler was doing business under that name. The notes were endorsed "The Federal Stock Food Company, Sam K. Strickler, Prop." There being no evidence upon which to base this instruction it should not have been given. Instruction No. 7 says "The court instructs the jury that if they believe from the evidence that the alleged promissory notes offered in evidence were made in the State of Missouri, then the legality of the same when questioned must be shown by the laws of the state where made and unless the plaintiff has shown by a preponderance of the evidence that the alleged promissory notes offered in evidence were made in accordance with the laws of the state where executed, then the jury will find the issues for the defendant." These notes were in fact, as the proof shows, signed in Missouri, but they were dat-



ed "Alton, Ill." and each contained the statement upon its face that it was to be paid at Alton Banking & Trust Co., Alton, Illinois. It has been held by the courts of this state since the case of Dousay vs. Mason, 35 Ill. 424, that the legality of a note made payable in this state is governed by the laws of this state and therefore this instruction did not state the law correctly.

For the errors herein pointed out the judgment in this case is reversed and the cause remanded.

Reversed and remanded.

Not to be reported.



Hon. George A. Crow Trial Judge
H.C. Harner Appellant
W. Pace Appellee

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
MARCH TERM, A. D. 1922.

TERM NO. 1.

AGENDA NO. 41.

EDWARD WHITTAKER and ST. LOUIS
UNION TRUST COMPANY, Trustees,
Defendants in Error.

VS.

WABASH, CHESTER and WESTERN
RAILROAD COMPANY, and LETCHER
IRONS,

Plaintiff in Error.

ERROR TO THE CIRCUIT COURT
OF RANDOLPH COUNTY

245 I.A. 643^{#4}

PER CURIAM.

The question presented by this writ of error have been fully considered heretofore by this Court on appeal from the same judgment and the matters in controversy have been determined. In the case now presented the defendants in error have presented no briefs, and therefore, as we consider it unnecessary to consider the case upon its merits, the judgment will be reversed pro forma, under Rule 27 of this Court.

Judgment reversed and cause remanded.

REVERSED AND REMANDED.

Not to be reported.

STATE OF TEXAS

APPELLATE COURT

2d DISTRICT

1922

and ST. LOUIS

COUNTY

FILE

FILE

and

1st in 12

The question presented by this writ of error was
considered heretofore by this Court on appeal from
it and the matters in controversy have been de-
termined. In the case now presented the defendants in error have
no briefs, and therefore, as is usual in such cases,
the case upon its merits will be determined by the
Court, under Rule 27 of said Court.
Judgment reversed, and case remanded.

Hon. L. D. Hager Trial Judge
Henry S. Baker - Appellant Atty.
John F. Mc Innis Appellee, Atty.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
MARCH TERM, A. D. 1922.

Filed

April 28, 1922

TERM NO. 19.

AGENDA NO. 20.

NATIONAL CASH REGISTER COMPANY,
Appellant.

245 I.A. 643 #5

VS.

APPEAL FROM THE CITY COURT

THE ALTON FUR HOUSE, LOUIS
WISEMAN, Proprietor, LOUIS
WISEMAN, THE CITIZENS NATIONAL
BANK & J. B. MAXFIELD, Trustee,
Appellees.

OF ALTON ILLINOIS.

BOGGS, J.

The National Cash Register Company, Appellant in this case, instituted an action in replevin in the City Court of Alton against appellee, to recover a certain cash register, the possession of which was claimed by both of said parties under chattel mortgages held by them respectively. A jury was waived and a trial was had before the Court on a stipulation of facts, in words and figures following:

"That the Alton Fur House, Louis Wiseman, proprietor, one of the defendants herein, on the sixth day of November, A. D. 1920, purchased from the National Cash Register Company one cash register, No. 1855125, style No. 756 G, for the sum of three hundred seventy five (\$375.00) dollars, of which amount fifty-five (\$55.00) dollars was paid in cash, and fifty (\$50.00) dollars *allowances* on previous order, leaving a balance of two hundred and seventy (\$270.00) dollars, for which said Alton Fur House, by Louis Wiseman, proprietor, executed a note, dated November 6th, 1920, payable in monthly installments of twenty (\$20.00) dollars each; that said cash register No. 1855125 was delivered to said Louis Wiseman on some date subsequent to November 6th, 1920, and prior to December 24th, 1920, and that he executed a chattel mortgage to the National Cash Register Company, plaintiff in this suit, marked

"Exhibit A", dated November 6th, 1920, acknowledged December 24th, 1920, before Daniel Gorman, a Justice of the Peace, and recorded in the Recorder's office of Madison County on December 30th, 1920, in chattel mortgage records C 25, page 409. And that, thereafter, he paid an installment of twenty (\$20.00) dollars, and that there was due on the sixth day of January, A. D. 1921, the sum of two hundred and fifty (\$250.00) dollars, and that there is now due from said defendant the said sum of two hundred and fifty (\$250.00) dollars. And that, thereafter, on the 28th day of June A. D. 1921, demand was made for the possession of said cash register on the Alton Fur House, Louis Wiseman, proprietor; Citizens National Bank and J. B. Maxfield, and refusal to give possession. That, on the 22nd day of November, A. D. 1920, the said defendant, Louis Wiseman, proprietor of the Alton Fur House, made, executed and delivered to the Citizens National Bank of Alton a certain chattel mortgage, marked "Exhibit B", to secure (5) notes, each for the sum of five thousand (\$5,000.00) dollars, due respectively in four months, six months, twelve months, eighteen months and twenty-four months after date, all bearing interest at the rate of seven per ceant (7%) per annum, and all dated November 22nd, 1920, and all executed by the said Louis Wiseman and Meyer Wiseman; and that said chattel mortgage covered the following described property, to-wit:

'All rags, paper, sacks and rope located at 1200 E. Broadway; all hides in the basement at 1206 E. Broadway; ^{local} ~~Losers~~ paper press in the garage behind 1206 E. Broadway; all scrap iron located north of the alley in block 10, Hunter & Russell's Addition to the City of Alton; one Reo truck, four cylinder motor; one Doelger and Kister iron shearing machine; one G. & E. Steel filing cabinet; one Burroughs adding machine, #3-396891; one check protector; one Underwood typewriter; all rags, paper, sacks, rope hides, tires, iron, scrap iron, fur and junk of all kinds and description, and all office equipment, including three desks, one cannon stove, filing case, chairs and all personal property what-

soever located in block ten (10) of said Hunter & Russell's Addition to the City of Alton, County of Madison and State of Illinois. Also all goods of a similar nature that may hereafter be purchased is included in this mortgage.'

That said chattel mortgage was acknowledged before Daniel Gorman, a Justice of the Peace, on the 22nd day of November, 1920 and afterwards, on the 27th day of November, 1920, was recorded in the Recorder's Office of Madison County, Illinois, in book X31, page 496; and that afterwards, on the 24th day of March, A. D. 1921, J. H. Dailey, acting for and on behalf of the Citizens National Bank, the mortgagee, (Took possession of the articles specifically described in said chattel mortgage, and also the cash register mentioned and described in the chattel mortgage to the plaintiff in this case, and all other property contained in the building and surrounding the location mentioned in said chattel mortgage and that the defendants in this case still have possession of said cash register and claim ownership under the said chattel mortgage to the Citizens National Bank.

It is further stipulated and agreed that one of the notes mentioned in said chattel mortgage, to wit, the one due in four months after date, was due on said 24th day of March, A. D. 1921.

It is stipulated and agreed that demand was made and a refusal, and this suit is in replevin to recover the cash register mentioned and described in the chattel mortgage to the plaintiff.

It is stipulated and agreed that Louis Wiseman, proprietor of the Alton Fur House, turned over all of this property to the Citizens National Bank at the time stated, to wit, March, 24th, A. D. 1921."

The Court found the issues in favor of appellee and rendered judgment against appellant for costs. To reverse said judgment this appeal is prosecuted.

It is the contention of appellant that while the chattel mortgage under which the Citizens National Bank is claiming is valid,

as between it and the Alton Fur House, that as to the rights of appellant, it is null and void.

The stipulation of facts discloses appellant's mortgage was dated November 6th, and was filed for record December 30th, 1920, while appellee's mortgage was dated November 22nd, and was filed for record November 27, 1920. The chattel mortgage held by appellee Bank failed to specifically describe the register, but it is claimed by it that the register is covered under one or all of three different descriptions in said mortgage, namely, "office equipment, all personal property" and "goods of a similar nature that may be hereafter purchased." Counsel for appellant insists that none of these descriptions are sufficient as against its mortgage which specifically describes the register.

The stipulation of facts fails to cover a very important matter in this case, that is, as to when the register was delivered to the Fur Company; the stipulation states it was delivered some time after November 6th and prior to December 24th, 1920. If the said register was not delivered until after the recording of the chattel mortgage held by appellee Bank, it would then have to come under the provision of "goods of a similar nature that may be hereafter purchased"; and would at most, give appellee, an equitable right or lien which would be subsequent and inferior to the lien of appellant under its mortgage recorded December 30th. *Morganstein vs. National Bank*, 125 Ill. App. 397 - 400; *Tennis vs. Midkiff*, 55 Ill. App. 642; *Schemerhorn v. Mitchell*, 15. Ill. 419; *Pinkstaif v. Cochran*, 58 Ill. App. 72. R. C. L. Vol. 5 Sec. 27.

In *Morganstein v. National Bank*, supra, the Court at page 400 says: "A party can create a lien on after acquired property in this state, *Gregg vs. Stanford*, 24 Ill. 17. But it seems to be the law in this state that as to such after acquired property, the mortgagee or pledges does not take a title which he can assert in an action at law against the mortgagor for the possession of the property, as he could do if the property had been in existence when the mortgage was given. What the mortgagee acquires by such mortgage of after acquired property is an equitable lien or charge upon the property".

Gregg v. Sanford, supra; Borden v. Croak, 131 Ill. 68." Where a mortgage is given to cover after acquired property it covers such property only in the condition in which it comes into the hands of the mortgagor. If that property is already subject to mortgages or other liens at the time the general mortgage does not displace them though they may be junior to it in point of time. It attaches only to such interest as the mortgagor acquires; and if he purchases property and gives a mortgage for the purchase money the bill of sale which he receives and the mortgage which he gives are regarded as one transaction, and the prior mortgage cannot displace such mortgage for the purchase money." R. C. L. Vol. 5, Sec. 27 Supra.

In this case the register not being specifically described in the chattel mortgage held by appellee Bank, the burden of proof was on it to prove that at the time of the execution of its mortgage said register was in the possession of the mortgagor, the Alton Fur House or that prior to the filing of the mortgage of appellant, appellee had taken possession thereof under its chattel mortgage. The stipulation of facts fails to cover this point.

It is the contention of appellant that the court erred in refusing the propositions of law offered by it and in holding the propositions of law offered by appellee. We think that this assignment of error is well taken.

The third proposition submitted by appellee and held by the court, we think states the theory on which the court tried this case. Said proposition being as follows: "The Court holds as the law that in this case the defendant's chattel mortgage, having been acknowledged and recorded previous to the chattel mortgage of the plaintiff, and that the defendant took possession of said cash register claimed in this case, then the title to said cash register vests in the defendant."

This proposition is erroneous in holding that appellee Bank, was entitled to hold said register as against appellant by

merely showing that its mortgage was executed and filed for record prior to the mortgage held by appellant, and that it had taken possession thereof. Said Bank did not take possession of said mortgaged property until March 24th, 1921, long after appellants mortgage had been filed for record. Under the law as we hold it, it was necessary on this record, for appellee Bank to have taken possession of said register under its mortgage prior to the filing for record of the mortgage held by appellant; and the trial court erred in holding to the contrary in said proportions of law.

For the reasons above set forth the judgment of the trial court will be reversed and the cause ^{will} be remanded.

REVERSED AND REMANDED.

Not to be reported in full.

When the case was filed for
 appeal, and that it had been
 did not take possession of
 the case, I. B. Jones at ex officio as
 Under the law as held in
 the appeal as held in

reasons above set forth the law
 and the case is remanded.

Hon. L. D. Yager - Trial Judge
H. J. Bandy - appellants atty.
W. P. Barton - Attorney's for Appellee.
D. H. Mudge

Filed July 11th 1922

March Term
1922

245 I.A. 644 #1

Term No. 42

Agenda No. 50

SOTIR DURATO,

Appellee,

vs.

JIM TCHOUKALEFF,

Appellant.

Appeal from City
Court of Alton.

OPINION BY HIGBEE, P. J.

Appellee, Sotir Durato, filed his bill in the City Court of Alton, alleging in substance that on March 10, 1920, he and appellant Jim Tchoukaleff, entered into a general partnership for the purpose of conducting a grocery business in a building located on the property of the Federal Lead Company in Madison County; that it was understood and agreed appellee should furnish sufficient money to erect a suitable building, and also furnish sufficient funds for the purchase of a stock of groceries; that appellant was to furnish all the necessary work, labor and services in conducting the business; that appellee expended \$800.00 in the erection of a building and \$590.26 in the purchase of stock that they were to be partners and share in the profits and losses equally; that the business as conducted by appellant resulted in great profits, but that appellant had continuously refused to make any accounting or settlement with appellee and had sold a horse belonging to the partnership and threatened to dispose of more of the partnership property. The bill prayed for an accounting, between the partners, and asked that appellant be decreed to pay to appellee what, if anything, should appear upon such accounting to be due, and that a writ of injunction issue forbidding appellant from incumbering and disposing of the partnership property. Appellee filed an answer denying the formation of such partnership, and that there was an understanding whereby appellee was to furnish the funds to erect the building and purchase a stock of groceries, admitting appellee loaned to appellant approximately \$800.00, and stating that the same had long since been paid. The answer further admitted that appellee sold appellant groceries to the amount of \$590.26, but alleged that appellee owed appellant \$700.00 for labor and services, and that he was still indebted to appellant in the sum of \$109.74. The answer further denied the other material allegations of the bill. Upon a hearing before the court a decree was entered finding that on May 10, 1920, the parties entered into a general co-partnership for the purpose of carrying on a certain grocery and restaurant business in a building located on the property of the Federal Lead Company that appellee was to furnish sufficient money to erect said building and to stock the same with groceries and provisions: that appellant was to furnish work, labor and service necessary to conduct and carry on

the stock of goods, fixtures and store building, but the decree does not make any disposition of the same leaving it for a future settlement between the parties. In *Randolph vs. Inman* 172 Ill. 575, which was a bill for an accounting of partnership affairs, the Supreme Court held that it was error for the trial court not to make sale or disposition of certain store fixtures belonging to the partnership in possession of the defendant. In the opinion of the court in that case is found the following language, "the present value of the fixtures was not shown, but whatever it may be, there should be a complete adjustment of all the partnership accounts and a disposition of all its property in this suit, leaving nothing for subsequent settlement. There should be a sale of said property and a division of the proceeds." In *Rosentiel vs. Gray* 112 Ill. 282 which was also a bill for the settlement of partnership accounts, the Supreme Court stated the general rule to be that "there can be no personal decree against a partner on account of an excess of his receipts over his disbursements, until his interest in the firm assets has been first exhausted to make good such deficiency." The Appellate court for the third district relying upon these two cases reversed a decree entered in a suit for an accounting of partnership affairs and remanded the cause, for the reason that it appeared from the record there were numerous accounts due the partnership which had not been collected. *Williams vs. Henkle* 201 Ill. App. 362.

Under these authorities it is quite clear that the trial court erred in entering a decree against appellant without first making some disposition of the stock, fixtures and store building. There should have been nothing left for subsequent settlement.

Because of the error indicated the decree is reversed and the cause remanded for further proceedings consistent with the views herein expressed.

Reversed and Remanded.

Not to be reported.

Hon. W. H. Hubbard. Trial Judge
F. M. Quinn - Appellant Atty.
J. H. Allis and J. D. Biggs - Appellee Atty.

Opinion by Higbee, J.

Agenda No. 13.

Term No. 36.

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

OCTOBER TERM, A. D. 1922.

THE PEOPLE OF THE STATE
OF ILLINOIS ex rel. FLOR-
ENCE E. ELAM,

Appellee,

vs.

GEORGE STANBERY,

Appellant.

Appeal from County
Court, Bond County,
Illinois.

Opinion by Boggs, P. J.

On the 15th day of February 1921 a complaint was filed before a Justice of the Peace in Bond County, by one Florence E. Elam, charging that she is an unmarried woman and that on the 24th day of January 1921, she gave birth to a bastard child and that appellant is its father. A trial was had in the County Court of said County resulting in a verdict finding appellant to be the father of said child. The motion for a new trial made by appellant was overruled and judgment was entered on the verdict in the form prescribed by statute. To reverse said judgment appellant prosecutes this appeal.

The record discloses that about March 20th, 1920, the prosecuting witness became a domestic servant in the home of Dr. A. R. Stanbery of Vandalia, Illinois. The Stanbery family consisted of the Doctor, his wife and appellant, a son. At that time the prosecuting witness was a woman of about twenty-one years of age and appellant, a student in the High School, was then some few months past seventeen years of age.

The prosecuting witness testified that a short time after she entered the employment of Dr. Stanbery, appellant made an indecent proposal to her and that she replied "that she was not that kind of a girl." That a short time thereafter appellant came home from high school early in the afternoon and went into his bed room; that she, the prosecuting witness was in the kitchen at the time, and that appellant called to her to come in his room; that she entered the room thinking that he wanted to know where his clothing was, and that appellant shut the door and had intercourse with her on the bed. She further testified that she missed her first menstrual period after said intercourse and that appellant gave her some medicine in tablet form which she took and that no results were derived therefrom. She further testified, that appellant afterward gave her a bottle of liquid medicine and advised her to go to his father, who was a physician, and to tell him "that

she was 'in bad' and not to tell his father he was the guilty party." She further testified that she went to Dr. Stanbery and that he told her that it was "the most dangerous time" and for her to come back the fourth month and that he would then help her. She further testified that she went to the Doctor at that time and that he advised her to go to a Dr. Tuckett in St. Louis. The prosecutrix remained in the home of Dr. Stanbery until the 2d day of October 1920. On the other hand appellant testified that he never had intercourse with the prosecuting witness and that the occurrence testified to by her never took place. Dr. Stanbery and Mrs. Stanbery both testified that the prosecuting witness had a great many men coming to see her during the months of April and May. Dr. Stanbery testified that on one occasion they found her on the porch with a certain young man along about one o'clock in the morning and that she was sitting on his lap. Certain other witnesses, school friends of appellant, testified to having seen the prosecuting witness in company with other young men and one or two of them testified to having seen her in a more or less compromising position. On rebuttal, the prosecuting witness denied having kept company with any of the persons named, except one young man, that she said she went to the show with on two or three occasions. One or two of the young men that were designated as having had kept company with the prosecuting witness went on the stand in rebuttal and denied ever having kept company with her or ever having had anything to do with her. While the evidence is sharply conflicting and while the greater number of witnesses testified on behalf of appellant, still we are unable to say that the verdict of the jury is against the manifest weight of the evidence. The credibility of the witnesses and the weight to be given to their testimony and to the facts and circumstances surrounding the case were for the jury.

It is next contended by appellant that the court erred in its rulings on the evidence. We have examined the record in connection with this assignment of error and are of the opinion that while some of the rulings of the trial court were not entirely correct, at the same time said rulings were with reference to matters that were not of major importance and were not of a prejudicial character.

It is next contended by appellant that the court erred in refusing to give the ninth instruction offered by appellant. We have examined this instruction and find that instructions No. 2 and No. 7 in practical effect cover the material matters set forth in refused instruction No. 9. The court, therefore, did not err in refusing to give this instruction, as it is not necessary for the court to give more than one instruction on a particular point.

It is also contended by counsel for appellant that the court erred in instructing the jury as to the form of their verdict. That part of the instruction complained of is as follows: "If the jury find from a preponderance of the evidence that George Stanbery is not the father of the bastard child born to Florence E. Elam, the form of your verdict may be, 'we the jury find the defendant not guilty.' " While this form of verdict is not in the best form and is somewhat mis-

leading, at the same time the jury were so fully instructed by the instructions on the part of the People and also on the part of appellant to the effect that the burden of proof was on the People to make out a case against appellant by a preponderance of the evidence before the jury would be warranted in finding against him, that we do not think that the jury could have been mislead by the form of verdict given by the court. At any rate, we are of the opinion that we would not be warranted in reversing the case on account of the instruction as to the form of the verdict.

It is further contended by counsel for appellant that the form of verdict as given by the court was erroneous in that it left out the word "real" in connection with the question as to whether or not appellant was the father of said bastard child. There is no merit in this contention.

Inasmuch as there was no substantial error in the ruling of the court on the evidence or on the giving or refusal of instructions, it was for the jury on the evidence to say whether or not the People had proven their case by a preponderance of the evidence. The jury having found for the People and against the defendant, we are not disposed to disturb their verdict as being against the manifest weight of the evidence.

The judgment of the trial court is therefore affirmed.

Judgment affirmed.

Not to be reported.

Hon. George A. Gow. Trial Judge
H. V. Jayce - Appellant Atty.
J. M. Webb & R. B. Hendricks
Appellants, attys.

Filed Oct. 29, 1923.

Term No. 33

Agenda No. 49

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

245 I.A. 644 ^{FB}

MARCH TERM, A. D. 1923

6051
BERTHA EHRHARDT,
Appellee.

vs.

THE PENNSYLVANIA FIRE
INSURANCE of Philadelphia,
Appellant.

Appeal from the
Circuit Court of
St. Clair County,
Illinois.

Opinion by BOGGS, P. J.

Action in assumpsit was instituted by appellee against appellant in the Circuit Court of St. Clair County to recover for the theft and destruction by fire of an automobile. The declaration consists of one count, in the usual form, charging the theft and destruction by fire of said automobile, notice to appellant, etc. To said declaration appellant filed a plea of the general issue and two special pleas. The first special plea avers that the policy sued on required that suit be instituted within 12 months after an alleged loss and that said provision of the policy had not been complied with. The second special plea sets forth the warranty made by appellee that she was the sole owner of said automobile and avers that she was not such sole owner at the time of said alleged loss. Appellee filed a replication to the first special plea averring waiver of the provision with reference to the time in which suit must be instituted. To which replication appellant filed a general rejoinder. Appellee filed a general replication to the second second special plea filed by appellant. A trial was had resulting in a verdict in favor of appellee for the sum of \$1500.00. To reverse said judgment appellant prosecute this appeal.

The record discloses that the automobile in question was kept in the garage of appellee and that on or about the 14th day of November, 1920, the same was taken therefrom and was shortly afterwards destroyed by fire. No one saw the automobile taken, but on Monday, November 15th, appellee discovered that the doors to her garage had been broken open and that the automobile was gone. She thereupon immediately notified the police department and also notified appellant's agency at St. Louis, of said theft. A Mr. Caver representing appellant called to ascertain the facts with reference to the missing automobile. A short time thereafter the remains of a burned automobile was located in Fair Count City, a suburb of East St. Louis, which later was ascertained to be the car in question.

It is first contended by appellant for a reversal of said judgment that the court erred in its rulings on the evidence. On the issue with reference to the ownership of the automobile appellant offered in evidence the record of a suit brought

before a Justice of the Peace of East St. Louis wherein Leo Schwab, a son-in-law of appellee sued for and recovered a judgment for damages to said automobile as tending to prove that appellee was not the owner of the same. The Court refused to admit said record and its rulings thereon is assigned as error. Appellee was neither a nominal or actual party to said proceeding and said record therefore was not competent evidence against her.

Curtenius v. Wheeler, 5 Bilm. 462; *Balenovic v. Ansick*, 181 Ill. App. 660-663; *Feitl v. Chicago City Railway Co.*, 211 Ill. 279; *Bellman v. Epstein*, 279 Ill. 34; *Greenleaf on Evidence*, Sec. 404. The Court did not err in said ruling.

It is next contended by appellant that the Court erred in refusing to admit in evidence a certified copy of the application of Leo Schwab for a Missouri license on said car. We are of the opinion that the Court did not err in refusing to admit the same as appellee was not a party thereto, but aside from the question of its admissibility, it was not important in this case for the reason that appellee herself testified that when she purchased the car it had on it a Missouri license which was turned over to her and that thereafter Schwab, her son-in-law, procured a Missouri license for the same; so that the fact sought to be proven is otherwise in the record through the testimony of appellee herself.

It is next contended by appellant that the verdict of the jury is against the manifest weight of the evidence; it being the contention of appellant that the evidence fails to show the ownership of said automobile and fails to show a waiver of the provision requiring that suit be instituted within twelve months. On the question of the ownership of the car, appellee testified without objection that she was the owner of the car; that she purchased the same and paid therefor the sum of \$1650.00. The only evidence tending to prove that appellee did not own the car was the fact that she permitted her son-in-law to use the same and to procure a Missouri license thereon; and also the fact she never took out an Illinois license for the same.

The proof, however, is to the effect that the car in question was always kept at the home of appellee; that appellee could not drive the same and that her son-in-law drove it for her.

Counsel for appellant seem to take the position that the fact that appellee violated the law in failing to procure a license from the State of Illinois should have barred or estopped her from maintaining her suit on the policy in question. The law, however, does not bear out appellant's contention. Unless the alleged violation of the law is shown to have proximately contributed to the loss or injury it will not bar a right of recovery. *Star Brewery Co. v. Hauck*, 222 Ill. 348; *Graham v. Hagman*, 270 Ill. 252; *Lerette v. Director General*, 306 Ill. 348.

In this case there can be no possible connection between the fact that appellee's automobile was stolen and afterwards destroyed by fire and her failure to take out a license thereon from the State of Illinois. It is further contended that even if not estopped or barred by such failure, it should be taken



into consideration by the Court in determining the weight to be given to appellee's evidence. The credibility of the witnesses and the weight to be given their testimony was for the jury and we are of the opinion and hold that the jury were warranted in finding that appellee, both at the time the insurance was taken out and at the time the car was stolen and destroyed was the owner of the same.

On the issue as to whether or not appellee waived the provision with reference to bringing suit within twelve months, appellee testified that in October, 1921, being less than a year before the destruction of said automobile, appellee called on the agent of appellant and stated to him that she expected to go away for a while and said to him: "What do you intend to do with this Insurance Company," and that the agent replied, "Now, I don't want to take any advantage of you, Mrs. Ehrhardt, give us a little time because we have never been so busy as this summer, we have not investigated yet"; that appellee then said, "Why the policy is only a year's time I have to sue on. I like to know where I am at?" To which said agent made answer, "I'll let you know in a short time." Appellee further testified that she mentioned getting a lawyer and that said agent said to her, "I don't believe our company ever had any lawsuit because there is no use to have any lawyers; you might as well wait because I am not going to take advantage of you." She further testified in effect that acting on the statement of said agent she went away and that the next time she saw him was January, 1922, and that he then told her the company would not pay her policy on the ground that she was not the owner of said automobile and that she could get a lawyer and bring suit. Appellee was corroborated with reference to this conversation by a Mrs. Griffith, who was with her at the time. Appellee also testified that in a prior conversation in October, 1921, with said agent, he stated that he would ask for time to make an investigation. We are therefore of the opinion and hold that the evidence sufficiently shows that appellee was led to believe it was not necessary for her to bring suit within one year and that the company was waiving that provision of the policy.

In *Allemania Fire Ins. Co. v. Peck, et al.* 133 Ill. 228, the Court in discussing a like question, says: "The main propositions which the defendant sought, without success, to have embodied in the instructions were, that to show a waiver by the defendant of the limitation clause in the policy, it was incumbent upon the plaintiffs to prove that their delay in bringing suit was at the special instance and request of the defendant and also, that such proof could only be made by positive evidence and could not be inferred. That such is not the law is clearly established by the authorities. Thus, in *Peoria M. & F. Ins. Co. v. Whitehill*, 25 Ill. 466, where the question arose in this state for the first time, the rule was laid down as follows: 'Where an insurance Company shall, by fraud, or by holding out reasonable hopes of adjustment, deter a party assured, being under such a condition to sue, from commencing his suit, he honestly confiding in the pretenses and promises of the insurer, the condition would be no bar.' This statement of the law has been cited with approval in various subsequent cases.



F. & M. Ins. Co. v. Chesnut, 50 Ill. 111; Derrick v. Lamar Ins. Co., 74 id. 404; Home Ins. Co. v. Myer, 93 id. 271. The same doctrine obtains in other states. In Martin v. State Ins. Co., 44 N. J. L. 485, it is said: 'If the delay to bring suit is a result to which the company mainly contributed, by holding out hopes of a amicable adjustment, the company can not be permitted to take advantage of the delay, under the limitation clause of the policy.'

And again in Phoenix Ins. Co. v. Grove, 215 Ill. 299, the court at page 303, quoting from Phoenix Ins. Co. v. Johnston, 143 Ill. 106, says: "Where one party has, by his representations or conduct, induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he will not, in a court of justice, be permitted to avail himself of that advantage."

The only evidence tending to dispute the testimony of appellee and the witness Mrs. Giffith, with reference to application for further time on the part of appellant to investigate the case is the testimony of the agent, Caver. He expressly denies the testimony of appellee and Mrs. Griffith in reference thereto and further testified he had never seen Mrs. Griffith until the day of the trial. There was, therefore, a sharp conflict in the evidence and it was for the jury to say what the evidence proved. We are not able to say they were not warranted in finding in favor of appellee on the issue raised.

It is next contended by appellant that the court erred in refusing to give its refused instructions Numbers One and Two. The court did not err in refusing to give refused instruction No. 1, for thereason that it leaves for the determination of the jury whether said policy contained certain warranties which were material to the risk assumed, without stating to the jury what the warranties were. The court therefore did not err in refusing to give this instruction at is allowed the jury to construe said policy.

Refused instruction No. 2 is an instruction which undertakes to inform the jury with reference to the preponderance of the evidence, etc. This instruction would have been proper had it not been for the affirmative plea filed by appellant alleging that appellee was not the owner of the car. However, the court gave to the jury ten instructions on the part of appellant. Four of them with the given instruction on behalf of appellee sufficiently informed the jury in regard to the proof that must be made by appellee in order to recover. The court did not err on its rulings on the instructions.

It is next insisted that the verdict of the jury is excessive. Appellee testified she paid \$1650 for the car at the time she purchased it; that it was a demonstration car; and that she had run it a little over one year. A witness on behalf of appellee who had to do with automobile testified that its fair cash market value was \$2000, and there was no evidence to the contrary. We hold that this assignment of error is not well taken.

Finding no reversible error in the record the judgment of the trial court is affirmed.

Judgment Affirmed.

Not to be reported.



Hon. J. G. Gillham, Trial Judge.
Williamson, Simpson & George, Appellant atty.
H. P. Baynton, Appellee atty.

245 I.A. 644 #4

Term No. 12

Agenda No. 5

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT
OCTOBER TERM, A. D. 1923

GEORGE G. PARKER, et al.
Appellees
vs.
JULIUS ROSENBERG,
Appellant.

Appeal from
Madison County
Circuit Court.

FILED
OCT 11 1923
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Opinion by BARRY, P. J.

Appellees filed a bill for injunction in which they averred that for more than 20 years they had enjoyed a right of way by prescription over the land of appellant, who had lately stopped and prevented persons from passing over said right of way in going to and from appellees' place of residence. It was also averred that appellant had placed obstructions in and across said right of way. A temporary injunction was granted by the Court without notice upon the filing of a bond in the sum of \$500, from which order granting the same an appeal has been taken to this Court.

Appellant states that the question ultimately to be decided in this case is whether appellees have a right of way over his land by prescription. When an answer is filed and the cause finally heard and a decree rendered a freehold may be involved which would require an appeal to go to the Supreme Court. At the present stage of the proceedings the statute requires the appeal to be heard and disposed of by this Court even though a freehold may be involved. *New Ohio Washed Coal Co. vs. Coal Belt Ry. Co.*, 116 App. 153.

We are inclined to the opinion that the averments of the bill and the affidavit in support thereof were sufficient to authorize the Court to award the temporary writ without notice. The Court exceeded its authority, however, when it ordered appellant "to at once remove any and all fences, gates and other obstructions from across said road or right of way and to keep same so removed until this Honorable Court, in Chancery sitting shall make other order to the contrary." That part of its order should be eliminated for the reason that a mandatory injunction, commanding the doing of a positive act, will not be ordered except upon final hearing and then only to execute the Judgment or decree of the court. *Hunt vs. Sain*, 181 Ill. 372-378.

The decree is reversed and cause remanded with directions to modify the same as above indicated.

Revised and Remanded with Directions.

Not to be reported in full.

Hon. F. R. Dave. Trial Judge
E. R. Shaw Appellant atty.
C. H. Tallmer & E. E. Calhoun, Appellee atty.

245 I.A. 644 #5

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

FILED

MAR 10 1924

OCTOBER TERM A.D.1923

RECORDED
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Term No.14

Agenda No.34.

Maggie Harrell,
Appellee.

vs

Bankers Mutual Life Co.
Appellant.

Appeal from Circuit Court

of

Clay

County.

Barry, P.J. - On July 7th. 1922, appellant issued a life insurance policy to Asberry W. Harrell for \$2,000.00 in which his wife, appellee, was named as beneficiary. The insured died Dec. 8, 1922 and appellee furnished appellant with proofs of death. Liability was denied and she brought this suit setting out the policy with the usual and necessary averments to state a cause of action. Appellant filed the general issue and two special pleas, one of which averred that the insured committed suicide while sane and the other while insane in violation of the terms of the policy, and that by reason thereof appellant was only liable for the amount of the premium paid which was duly tendered. Issue was joined on the pleas and the trial resulted in a verdict and judgment for appellee.

Appellant contends that the insurance contract is a combined life and accident policy and that by reason of the alleged fact the burden of proof was upon appellee to show that the death of her husband was accidental and not suicidal under Fidelity

Agenda Item 1

30

On July 19, 1934, the appellant insured his life insurance policy with the Mutual Life Insurance Company of New York, which was named as beneficiary. The policy was for \$2,000.00, which was assigned to the appellant. The appellant furnished evidence with proof of death. It was denied and she brought this suit setting out the facts with the usual and necessary averments to state a cause of action. The appellant filed the general issue and two special issues which averred that the insured committed suicide while sane and of sound mind, and that the other while insane in violation of the law, and that by reason thereof he was only liable for the face of the policy and which was duly tendered. Issues were framed on the facts and the trial resulted in a verdict and judgment for the appellee. The appellant contends that the insurance contract is a contract of life and accident policy and that the reason for the death of the insured was not suicide but accident and not suicidal under the contract.

and Casualty Co. vs. Weise, 182 Ill. 496, Wilkenson vs. Aetna Life Ins. Co. 240 Ill. 205 and similar cases. An examination of the policy discloses that it is not an accident policy but a straight life insurance contract which gives the insured the right to an optional disability settlement upon proof that he has become totally and permanently disabled either by accidental injuries or disease. That provision has no bearing, whatever, upon the case. Appellant had the burden of proving its special pleas or one of them, Supreme Tent K.O.T.M. vs. Stensland, 206 Ill. 124; Knights Templars Indem. Co. vs. Crayton, 209 Ill. 550; Ferrero vs. Knights of Security 209 Ill. 476. That being true the court did not err in the giving or refusing of instructions as to the burden of proof on that issue. The jury was fully and fairly instructed.

It is insisted that the evidence conclusively proves that the insured committed suicide and that the verdict is manifestly against the weight of the evidence. It is admitted that he bore a good reputation for honesty and uprightness of character, but it is argued that he was heavily in debt; that he was insolvent; that he had forged his father's name to three notes amounting in all to about \$800.00; that those things in connection with the position in which the body and gun were found and the lack of powder burn on the clothing or flesh point to suicide and nothing else. On the other hand there is evidence to the effect that he had been troubled with a severe headache and was not feeling well; that he had slept well the night before and had his breakfast in bed that day; that he was up and dressed for dinner and after dinner was in a cheerful mood and was in the sitting room smoking his pipe and talking to his wife while his daughter washed the dishes in the kitchen; that his wife went into another room and he into the bedroom where the gun was; that soon after the report of the gun was heard and about that time other members of the family were coming

...a. White, 1234 Ill. Ave., Wilkes-Barre, Pa.
...examination

...loses that it is not an accident, but a
...of which gives the insured the

...to the settlement upon proof thereof
...and eventually settled upon by settlement

...Other provision has no bearing
...defendant and the question of proving its actual

...and, 84
...White Temple, Wilkes-Barre, Pa.

...vs. Knights of Security
...did not sit in that living or sleeping of

...to the burden of proof on that. The jury was
...indicated that the evidence conclusively proves

...It is settled
...A good result for rationality and wisdom

...but it is argued that he was actually in doubt;
...was in fact out; that he had forced his father's name

...noted reporting in 1911 to about 1800.00; that these
...connection with the position in which the body and gun

...found and the lack of powder-burn on the clothing or flesh
...evidence and nothing else. On the other hand there is

...due to the effect that the had been transfused with a severe
...she and was not feeling; that she had also felt the

...alone and ... in bed that day; that she was
...dressed for dinner and later dinner in evening

...and was in the sitting room looking at the ... and ...
...white walls ... the dishes in the kitchen;

...the went into another room and he into the bedroom
...the ... the report of the gun was

...about that time other members of the ... in ...

into the house; that they all went into the room and found deceased and the gun on the floor; that he never spoke and died instantly.

The evidence further discloses that the gun was kept in a corner where clothes hung over it and was back of a rocker. It is argued by appellee that the gun was accidentally discharged either by being caught in the clothes which hung over it or that it came in contact with the rocker as the deceased was getting it. There is no evidence that he was being pressed by any of his creditors or that any one then knew that he had forged his father's name. Those notes were renewals and no doubt he could have renewed them again without being found out. The burden of proving self-destruction was upon appellant and in the absence of such proof death by natural or accidental causes may be presumed, *Knights Templars Indem. Co. vs. Crayton, supra.*

Under all of the evidence in the record and the reasonable inferences to be drawn therefrom, together with the presumption of law that all men have a natural desire to avoid personal injuries or death, it was a question of fact for the jury and we would not be warranted in holding that the verdict is manifestly against the weight of the evidence. That being true the judgment must be affirmed.

AFFIRMED.

Not to be reported.

over it and was back on a hooker
at the time. I accidentally dis-

There is
editors on that. My own opinion is that
it's a name.

of such good death - natural or accidental
resumed. Rights Temporarily Taken. Ob. vs.

or death, it was a question of that for the
we would not be needed in holding the verdict
heavily against the weight of the evidence. That being
admitted.

Hon. A. S. Abney - Trial Judge.
James B. Linn *appellants atty.*
Chas. H. Thompson *appellee atty.*

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT.
OCTOBER TERM, A.D. 1923.

FILED

10 1924

Robert E. Noel
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Term No. 15.

Agenda No. 49.

245 I.A. 645^{#1}

The People of the
State of Illinois,
Defendant in Error.
vs
Joe Du Bois,
Plaintiff in Error.

Error to County Court
of
Saline County.

Barry, P.J. - Plaintiff in Error, at the July 1923 Probate Term of the County Court of Saline County, entered a plea of guilty to an information charging that he in July 15th. 1923 at and within said county, unlawfully did then and there possess intoxicating liquor in violation of the Illinois Prohibition Act, contrary to the statute, etc. It is contended that the information does not charge a criminal offense; that inasmuch as the possession of intoxicating liquor may be lawful it was incumbent on the prosecutor to aver in his information such a state of facts as would negative a lawful possession on the part of plaintiff in Error. That it is not sufficient to aver that he unlawfully possessed the liquor in violation of the Act.

Section 3 of the Act provides that no person shall possess any intoxicating liquor except as authorized by the Act.

Section 39 provides that it shall not be necessary in any information or indictment to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful. The act complained of in this case is the possession of liquor in violation of the

... ..

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• *Journal of the American Medical Association*, 1997; 277: 1001-1002.

[illegible]

statute. Every possession of intoxicating liquor is prohibited except it be authorized by the Act. The information charges that the possession was unlawful and in violation of the Act and meets the requirements of said section No.39.

In ~~the~~ other cases decided at the present term of this court we have held that such an information is sufficient.

It is argued that the County Judge at a Probate Term was without jurisdiction to accept the plea of guilty. The Statute expressly provides that "The Court may receive the plea of guilty and pass judgement, or, if the accused will waive a jury and be tried by the court without a jury, the court may, upon notice being first given to the State's Attorney, try the cause and pass judgement as well at a probate as at a law term of said court."

Cahill's Ill.St.Ch. 37 par. 318. The next paragraph of that Act provides that when an indictment has been certified to the county court the judge of that court shall have power to receive a plea of guilty as well in vacation as in term time. We are of the opinion that the court had authority to accept the plea of guilty at a probate term.

Although the case is before us on the Common Law record alone, counsel have much to say about the facts and newspaper items. The only salient facts of which we can properly take notice is that plaintiff in Error was charged with a violation of the prohibition law; that he was arrested and brought before the court and after being duly admonished he entered a plea of guilty as charged in the indictment and persisted in so doing. Counsel argue that no one explained to his client that he could be fined and sent to jail if he pleaded guilty and that the court did not hear evidence in mitigation or aggravation of the offense to enable it to fix a proper punishment, but the record is to the contrary, People vs Pennington, 267 Ill.45.

It is suggested that the judgement is void because the transcript of the record contains no plactia. If the point were

It is argued that the record is not in the State's favor.

... judgment or if the record is not in the State's favor... about a jury... to the State's Attorney... a probable cause... had been established... shall have... in vacation... the court had authority to... the record is not in the State's favor...

... before us on the Common Law record... the record is not in the State's favor... which we can... was charged with... that he was... he entered... the... to his client that he... and that the court... or aggravation of the... but... record is to... 207 filed.

... no... the record... 2.

properly raised the State's Attorney could procure leave to supply the alleged defect, Keller vs Brickley, 63 Ill. 496. The abstract of the record is the pleading of the party seeking to have such record reviewed upon appeal or by writ of error, and the error relied upon to effect a reversal must be made to appear by such abstract, People vs Paul, 167 App. 557-559; Gage vs City of Chicago, 211 Ill. 109. The abstract in this case informs us that plaintiff in error filed a praecipe for record but does not show what the clerk was requested to incorporate in the record. We will not examine the transcript of the record for the purpose of finding cause for reversal, Gage vs City of Chicago, 211 Ill. 109-112.

The judgment is affirmed.

AFFIRMED.

Not to be reported.

1944

Han. Sec. A. Crow. Trial Judge.
Barthel, Farmer & Klingel appellant atty.
H. E. Knowles & J. M. Uebel. Appellees atty.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT.

OCTOBER TERM A. D. 1923.

FILED

MAR 10 1924

Robert B. Rode
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Term No. 21.

Agenda No. 52.

245 I.A. 645 #2

Tille Scott, Admx. & etc.
Appellee.

vs

East St. Louis & S. Ry. Co.
Appellant.

Appeal from St. Clair Circuit
Court.

Barry, P.J. - In her declaration appellee charged that on July 31, 1922 her intestate was in the employ of appellant and that he and appellant were engaged in interstate commerce, that ~~while~~ engaged her intestate was assisting in the repair of one of appellant's tracks at or near the intersection of Main and 75th Street in Belleville, Illinois, when appellant's servants so negligently and carelessly drove and ran a car in the carriage of passengers along and over said track at said point that in consequence of said negligence and carelessness the car with great force and violence collided with her intestate and he was then and there killed; that he left surviving his father and mother, etc. The general issue was pleaded and the trial resulted in a verdict and judgment of \$2500.00.

For five months prior to the day of the accident appellee's intestate was a member of a section gang of which his father was the foreman. His father says that deceased was familiar with the operation of cars upon the different tracks, that he was 26 years old and his hearing ^{was} good. The south track was used by east bound and the north track by west bound cars.

INVESTIGATION

COURT

DISTRICT

AGENCY

SA

REPORT

DATE

On or about the 1st day of May, 1938, at New York, New York.

I, the undersigned, being a duly qualified and sworn agent of the Federal Bureau of Investigation, do hereby certify that the following is a true and correct copy of the report of the Special Agent in Charge, New York, New York, dated and captioned as above.

He and appellant were engaged in interstate commerce.

They engaged her interstate was assisting in the re-

ceipt of one of appellant's friends at a rooming house.

At the time of the receipt of the friend, appellant was

in a car in the company of passengers and was

at the time of the receipt of the friend, appellant was

in the car and was at the time of the receipt of the friend,

her interstate and it was then and there killed; that he left

the car and was at the time of the receipt of the friend,

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the car and was at the time of the receipt of the friend,

Cars ran regularly every fifteen minutes, besides extras from time to time. The father says that all of the men knew that the speed of cars at the point in question was usually 25 or 30 miles per hour. The car that struck deceased was running at about that speed.

The men had been at work in the vicinity all day and the accident occurred about 4:35 P.M. They had shoveled the chat tracks and placed it upon the concrete pavement which was about two feet from the rail. They had raised, tamped and tightened the joints and deceased and others were sweeping the chat from the pavement into place. Deceased was working on the south side of the south or east bound track and was sweeping the chat into the two foot space between the pavement and the south rail. His father saw and heard the car when it was 1200 feet away and says that anyone could have seen it that distance who looked but that his son didn't see it because his back was toward the approaching car. He says he was about 70 feet from deceased and hollered at him but that he could not hear him because the car made so much noise. All of the other men saw the car and got out of the way. At least two others called to deceased before he was struck but he did not seem to hear them.

Mr. Simmonds, one of the section men, says that the car was very close to deceased when he stepped over into the chat and was struck. He says he saw the car when it was about 300 feet away and heard the whistle and hollered to deceased. Mr. Deckert, another member of the crew, says that deceased swept until the car was 5 or 10 feet from him and when he straightened up he turned with his back toward the car and took about one step and the car hit him. He says that he heard the whistle and saw the car when it was 500 or 600 feet away and that the bell was ringing 30 or 40 feet before the collision occurred. Mr. McMillan, another member, says that he heard the whistle

men had been at work in vicinity all day

occurred about 4:35 P.M. They had shoveled

into place. Deceased was working

got out the car. At least two others
to deceased before he was struck but he did not seem

Mr. Simmons, one of the section men, says that the car
lost to deceased when he stepped over the car
as struck. He says he saw the car when it was about 300
and heard the whistle and roared to deceased.
member of the says that
the car was 5 or 10 feet from him and when he stepped
the car and took about
he was the whistle
of 500 feet and that the

another member says that he heard the whistle

when the car was 400 feet away, that he saw the car before he heard the whistle. He says that when the car was 40 or 50 feet from the deceased that the latter was 3 or 4 feet from the track. He says the bell was ringing when the car was 40 or 50 feet from deceased. His testimony is a little mixed as to whether it was the bell of the whistle he heard when the car was 400 feet awya. Mr. Owen says that he heard the bell and whistle when the car was 75 feet from deceased. Mr. Schwartz says the gong was sounded 12 or 14 times when the car was about 50 feet from deceased.

All of the foregoing appears from the evidence offered by appellee. To make out a cause of action it was necessary for appellee to aver and prove the exsistence of a duty on the part of appellant to protect her intestate from the injury complained of, a failure to perform that duty, and that the death of her intestate resulted from such failure, *Miller vs Kresge Co.* 506 Ill. 104. It is conceded by counsel for appellee that if there had been no rule, custom or practice with reference to the method of doing the work and the operation of cars and a breach of the duty thereby imposed appellee would not be entitled to recover.

We will now consider the evidence offered by appellee with reference to the exsistence of such a rule, custom or practice and the breach thereof. The father of deceased had been foreman of a section gang on appellant's road for more than 20 years. His entire testimony on this subject is as follows: -
"If the track was clear I gave him (the motorman) ^{av} the highball; if it were not clear I did not get any signal at all. If I were working on the track and the track was not clear I would give them a stop; I stopped them. When the motorman approached our gang he gave 3 or 4 whistles called a clearance. By track clearance is meant whether the track is in shape to run over; if the track is in shape to run over then there are no signals required;

...from ...

...of the ...

...To make ...

...and prove the existence of the ...

...to protect her interests ... the injury ...

...the best ...

...from ...

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...been ... custom or practice with reference to ...

...the work was ... operation of ... and ...

...the ... thereby imposed appellee would not be entitled ...

...the ...

...we will now ... the evidence ... by appellee ...

...reference to the existence of such a rule ...

...thereof. The reason ...

...of a section ...

...testimony on this subject ...

...was clear I ...

...not clear I did not get ... of all. If I were ...

...on the track and the track was not clear I would give ...

...I stopped them, then the motorman approached me ...

...by ...

...he gave ...

...to ...

the track there was in good condition. None of those signals were given on this occasion." If no signals were required when the track was in shape to run over, and the track was in good condition at the time in question how can it be said that appellant violated any duty to the deceased in failing to give signals that were not required by the alleged custom or practice?

From the evidence it is quite evident that the signals required by the alleged custom or practice were for the purpose of ascertaining whether the track was in shape to run over and was not intended as a warning to the men to get out of the way. This is more apparent because the father further testified that:- "When cars came along the crew would every time have to get out of the way and let them pass; that was the way it had been operated as long as Raymond (deceased) had been working with the gang." Mr. Simmonds testified:- "The cars passed us frequently and our duty was to get out of the way". Mr. Deckert testified:- "Most generally the motorman in approaching our gang would ring their bells and blow the whistle; I don't know whether it was a custom. It was part of my duty to look out for cars and get out of the way. Some of the cars slackened speed as they passed the section gang, - could not say whether it was a rule. The section men were expected to watch out and get out of the way." Mr. McMillan testified:- "I ^{not} ~~don't~~ know of any practice of the motorman to blow a whistle when approaching the section gang."

If it be conceded that the custom or practice existed and that the signals required thereby were intended as a warning to the men to get out of the way and the particular signals were not given, can it be said that the failure to give them was the proximate cause of the death of the intestate? Appellee's evidence shows conclusively that the foreman saw and heard the car 1200 feet away and that the deceased could

If no signals were required to run over and the track was in the hands of the railroad, the signals were not required. The signals were not required.

It is quite evident that the alleged custom or practice were for

with the gang. Mr. Stinson testified. The gang frequently and our duty was to get out of the way. testified:-

for cars and get out of the way. Some of the cars that it was a rule. The section men were expected to out and get out of the way. Mr. Stinson testified. know of the practice of the motorman to blow a whistle approaching the section gang.

If it be conceded that the custom or practice was and that the signals required thereby were intended as a warning to the men to get out of the way and the practice were not given. It is said that the failure to

have seen and heard it for the same distance. The foreman stood about 70 feet from his son and hollered at him but he could not hear because of the great noise of the approaching car. Two other men called to him, but he did not seem to hear them. Some of the other witnesses for appellee saw the car and heard the whistle when the car was 700 feet away. One of them heard the bell when the car was 75 feet from deceased, others heard it when it was 30, 40, ⁵⁰ 50 feet from him. Intestate knew that cars only came from the west on that track yet he worked with his face to the east without looking to see whether a car was coming. One of appellee's witnesses says that when the car was 40 or 50 feet from deceased the bell was ringing and deceased was 3 or 4 feet from track. Another says that just before the collision deceased stepped over nearer the track. The section gang consisted of the foreman and six men besides the deceased. All of them saw and heard the car in ample time to get out of the way. From Appellee's evidence it conclusively appears that ample warning was given of the approach of the car and that this most unfortunate accident was not due to negligence on the part of appellant. If it can be said that there was a breach of the alleged custom or practice the conclusion is irresistible that the alleged negligence in that regard was not the proximate cause of the death of the deceased. Under the law and the evidence appellee was not entitled to recover and the judgement is reversed.

Reversed with finding of facts.

The clerk will incorporate in the judgement the following:

The Court finds that the death of appellee's intestate was not caused by the negligence of appellant.

Not to be reported.

For the same reason, the fact that the deceased was not seen to hear the bell, does not prove that he did not hear it.

It is also to be noted that the deceased was not seen to hear the bell, but that he was seen to hear the engine.

The fact that the deceased was not seen to hear the bell, does not prove that he did not hear it.

It is also to be noted that the deceased was not seen to hear the bell, but that he was seen to hear the engine.

The fact that the deceased was not seen to hear the bell, does not prove that he did not hear it.

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The fact that the deceased was not seen to hear the bell, does not prove that he did not hear it.

It is also to be noted that the deceased was not seen to hear the bell, but that he was seen to hear the engine.

The fact that the deceased was not seen to hear the bell, does not prove that he did not hear it.

It is also to be noted that the deceased was not seen to hear the bell, but that he was seen to hear the engine.

The fact that the deceased was not seen to hear the bell, does not prove that he did not hear it.

It is also to be noted that the deceased was not seen to hear the bell, but that he was seen to hear the engine.

Hon. George A. Crow.
E. W. Kretnier
Charles Webb.

Trial Judge.
Appellant Atty.
Appellee Atty.

STATE OF ILLINOIS.

APPELLATE COURT

FOURTH DISTRICT.

OCTOBER TERM A.D. 1923.

2451.A. 645 #3

Term No. 25.

Agenda No. 31.

MARY THOMPSON,
Appellee,

Vs.

LAURA JONES,

Appellant.)

APPEAL FROM

ST. CLAIR

CIRCUIT COURT.

FILED

MAR 10 1924

Robert B. Roy
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Barry, P.J.- This is an action for slander and was begun on Aug. 30, 1922 to the September Term of the Circuit Court. Appellant retained one H. E. Morgan as her attorney, and he filed the general issue. The case was reached for trial on October 19th, 1922 and neither appellant nor her attorney was present. Appellee submitted her evidence to a jury and a verdict for \$1500.00 was returned. A few days later appellant entered a motion for a new trial, supported by the affidavit of her said attorney. Appellee filed counter affidavits and appellant's attorney filed another affidavit in rebuttal. The court overruled the motion and entered judgment on the verdict.

Appellant's sole contention is that the affidavit of her attorney was sufficient to entitle her to a new trial. That affidavit states that the attorney was retained by appellant to represent her in this suit; that he secured a copy of the declaration and on Sept. 11, 1922 filed a plea of not guilty and gave the circuit clerk his name and address and caused such name and address to be written upon the back of the cover containing the files; that he requested the clerk of said court to

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notify him when the cause was set for trial; that, neither he nor appellant was ever notified of the setting of the case for trial; that he investigated the facts involved in the case and interviewed the witnesses and that it is his belief and opinion that appellant had a meritorious and good defense to the suit in that she did not make the statements attributed to her in the plaintiff's declaration: that if a new trial is granted a different verdict would be rendered.

In order to entitle a party to have a verdict set aside and a new trial awarded, where the trial was had in his absence and that of his attorney, but on the regular call, he must show that he exercised proper diligence to avoid the result, and it must affirmatively appear that injustice has been done, *Kaeley vs. O' Brien*, 66 Ill. 358; *Singer Mfg. Co. vs May*, 86 Ill. 398; *Koon vs. Nichols*, 85 Ill 155. A new trial will not be granted, where the cause for which it is claimed, is attributable to the negligence and inattention of the party or his attorney, *Brunson vs. Clark*, 151 Ill. 495; *Staunton Coal Co. vs. Menk*, 197 Ill. 369; *Punk vs. Fire Ass'n*. 157 App. 602.

A motion to set aside a default is addressed to the sound legal discretion of the court, and unless such discretion is abused this court will not interfere.

An affidavit is insufficient if it fails to show that the defendant has a meritorious defense to the claim or any part thereof, *Eggleston vs. Royal Trust Co.* 205 Ill.

170. In the case at bar appellant did not file her own affidavit that she did not speak the slanderous words charged in the declaration. She should know whether she spoke them. If she did not, she should have so stated

in an affidavit. Instead, her attorney simply states that from his investigation and interview of witnesses it is his opinion and belief that she did not speak them. Such an affidavit is insufficient to show a meritorious defense. S. & N. W. Ry. vs. Ross, 88 Ill. 179; Kitchcock vs. Herzer, 90 Ill. 543.

The affidavit of the attorney fails to show diligence. In substance it is simply that he gave the clerk his name and address and caused the same to be placed upon the file cover and requested the clerk to notify him of the setting of the case. He does not even claim that the clerk agreed that he would do so but if he had we know of no law that would warrant him in relying upon such a promise or that would entitle his client to a new trial if the clerk failed to do so. The state, at great expense, provides courts and juries in order that litigants may present their cases for adjudication. It would not be fair, to the public or an opposing litigant to set aside a verdict and grant a new trial on the showing made in this case. If the judgment is a hardship on appellant it is due solely to a failure to exercise that degree of diligence which must be required of litigants in order that courts may not be delayed in the administration of the law. We are not warranted in saying that the court abused its discretion and the judgment is affirmed.

AFFIRMED.

Not to be reported.

David. Instead, her attorney simply states
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S. E. W. Ry. vs. Rose, No. 111, 179; Kitchen

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in this case. If the judgment is a hardship
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intention of I.W. and the judgment is

APPROVED.

Honorable J. I. Gillham Trial Judge.
Gurs & Gurs - appellant atty.
D. H. Mudge - appellee atty.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT.

MARK 10 1924

Robert B. Reece
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

OCTOBER TERM A. D. 1935

245 I.A. 645 #4

Term No. 50

Agenda No. 13

John Holst,
Appellee

vs

Christ Bischoff,
Appellant.

Appeal from Circuit Court

of

Madison

County.

Barry, P.J. - Appellee filed a bill to enjoin appellant from obstructing or interfering with the natural flow of the water from his land across that of appellant. Appellee's land lies south of and adjoins appellant's with a road running east and west between the two tracts. The parties had placed a tile drain across the road several years ago. Some of the tile became broken and appellant refused to allow appellee to repair the same. Appellee claimed that appellant had obstructed and interfered with the natural flow of the water which was in a northeasterly course over appellant's land. Appellant claimed that the natural flow of this water was to the southwest over the land of appellee.

The cause was tried before the Chancellor who saw and heard the several witnesses who testified on behalf of the respective parties and came to the conclusion that appellee was entitled to the relief for which he prayed. From a careful consideration of all the evidence we cannot say that the decree is manifestly against the weight of the evidence. On the contrary we are of the opinion that it is supported by the evidence except as hereon after mentioned.

We find no evidence in the record to justify that portion

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of the decree which reads as follows;- "And said defendant is directed and ordered to remove the dirt and make or open a ditch from the north end of said tile to the southerly end of said drain ditch extending in a northeasterly direction through said southwest quarter of the southwest quarter of section twenty-four, Town 3 N.R.9 west of the 3rd.P.M., Madison County, Illinois, owned by defendant as aforesaid, so that the water flowing in a northerly direction through said tile will not be obstructed ^{and} flow into said drain ditch."

The decree is modified by striking out the portion above quoted and as so modified the same is in all other respects affirmed. Each party will pay one-half of the costs in this court.

DECREE MODIFIED AND AFFIRMED.

not to be reported.

STATE OF ILLINOIS
APPELLATE COURT
OCTOBER TERM A.D. 1923.

TERM NO. 52. *Hon. Geo. A. Crow - Trial Judge* AG. NO. 37.
Terry, Gwaltig & Powell - Appellants Attorney

Guns & Guns - Appellee attorney

JAMES STEELE, ADME. &c., :
Appellee, :

APPEAL FROM

VS. :

MADISON

ST. LOUIS, SPRINGFIELD :
& PEORIA R. R. :

CIRCUIT COURT.

Appellant. :

MAR 0 1924

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

245 I.A. 645 #5

Barry, P. J. -Appellee sued to recover for the death of his intestate which resulted from a collision of the car in which she was riding with appellant's electric train at a grade crossing in the country three or four miles east of Mitchell. In his original declaration he charged general negligence in the operation of the train. The first additional count charged negligence in driving the train at a high and dangerous rate of speed; the second, in driving the train over said crossing without giving reasonable warning of its approach; the third, in running the train without displaying a headlight or other light on the front part thereof, and without giving reasonable notice of its approach to said crossing. A plea of not guilty was filed and the trial resulted in a verdict and judgment for \$2500.00.

The highway, upon which the accident occurred, is a state hard road running east and west and is crossed by appellant's tracks in a northeasterly and southwesterly direction at the crossing in question. There is no obstruction to the view as a traveler approaches the crossing from either direction. The bed of the railroad track is 4 or 5 feet higher than the surface of the ground except the highway on either side which gradually

risers to the height of the track at the crossing. There is some reference to a high hedge which extends south from a point 200 feet east and 10 or 15 feet south of the crossing. It is apparent that for more than 200 feet there was nothing to obstruct the view of one going west toward the crossing. No witness saw the hedge on the night in question, and no one testified that it obstructed the view of the occupants of the car. Appellant's train consisted of an electric motor car 50 feet long to which was attached seven freight cars and a caboose. The motor car was equipped with an electric headlight that threw a bright light several hundred feet ahead of the train. There were several incandescent lights in the car and windows on either side.

From Appellee's evidence we learn that a young man named Adelhardt, driving his Ford roadster with two young men and four young ladies as his guests and with all of the curtains on his car, left Collinsville at about 8 P. M. on a dark, cold night in January, 1923 to ^{attend} a dance at Wood River. The driver sat on the left side and Miss Blythe on the right of the front seat with the deceased between them, and the others in the back seat. The car struck the motor car on the side near the rear end and the occupants were thrown out and injured. The deceased died a few hours later. The driver and some of the others were rendered unconscious; some came to in a few minutes and others remained unconscious for several days. It seems to be an established, if not an admitted, fact that just before the collision Mr. Seibert had approached the crossing from the west and stopped for the train to pass and that he had bright lights on his car.

The evidence on the part of appellee consists of the testimony of the occupants of the car in question, and that of those who were in the Cutrell car which was somewhere behind the Seibert car, and was going east toward the crossing. From that testimony certain

facts stand out clearly. The driver and all of the occupants of the car in question who testified upon the subject say that their car approached the crossing at a speed of 15 miles per hour and that the brakes were not applied until the car was about 15 feet from the side of the motor car. The car, then, was being operated at a speed prohibited by Cahill's Ill. St. Ch. 121, par. 161. The driver says that at the speed he was going he could stop the car within 25 feet. It is a fair inference that if he had approached the crossing at not to exceed ten miles per hour he could have stopped within a less distance and might have avoided the accident.

It further appears that the driver was the only person in the car who knew that there was a railroad crossing over which they had to pass and he says he didn't know just where it was. He says he had headlights and a spot-light on his car and could see 50 or 75 feet ahead. Another occupant says he could see ahead for 100 to 200 yards. Another that she could see for a long distance. No one testified that he or she looked or listened for trains, and no one seemed to be aware of the fact that they were near a crossing. Some of them say they were not expecting a crossing. Some do not remember that an accident occurred, and one does not remember that he was in the car. Some say they were looking ahead, and some in the back seat that they could see ahead but not to the sides. The driver says he was looking straight ahead and saw the lights of the Seibert car, but did not see the train until the front end of the motor car passed between him and those lights. He then applied the brakes and was about 15 feet from the side of the motor car. No occupant of the car saw or heard the train until that time and but two of them saw it then. The others never saw or heard it at any time.

All of the occupants of the car but one say they heard no bell or whistle and saw no lights on any train. Only two of them saw the

lights of the Seibert car. Three or four of them have suits pending for injuries received in the collision. The driver of the Cutrell car says that his car was about 200 feet behind the Seibert car going east for 3 or 4 miles west of the crossing. He did not see the Seibert car when it stopped west of the crossing and when he got to the crossing that car had crossed the crossing and turned around with its lights shining on the crossing. He says he did not see the train before or after the accident. None of the occupants of the Cutrell car saw or heard the train before the accident. Some of them saw it after the accident and others did not see it at any time. Some of them say the Seibert car did not stop west of the crossing. Some say they were only 50 or 75 feet behind the Seibert car for 3 or 4 miles west of the crossing. One says they were only about 50 feet behind the Seibert car at the time of the accident but he did not see or hear the train or the crash of the collision. There were four persons in the Cutrell car, none of whom testified they looked or listened for trains. They all testified that they did not see or hear the train before the accident and some did not see it after the accident although it backed up over the crossing. They were all permitted to testify, over objection, that they heard no bell or whistle and saw no light on any train, although they did not say they were looking in the direction of the train.

Mr. and Mrs. Seibert testified on behalf of appellant that as they approached the crossing from the west they saw the car in question coming from the east and the train coming from the southwest, and that their car stopped west of the crossing with its bright lights on. They saw and heard the collision. The fact that the Seibert car stopped west of the crossing is shown by several witnesses. When the collision occurred Mrs. Seibert fainted, and

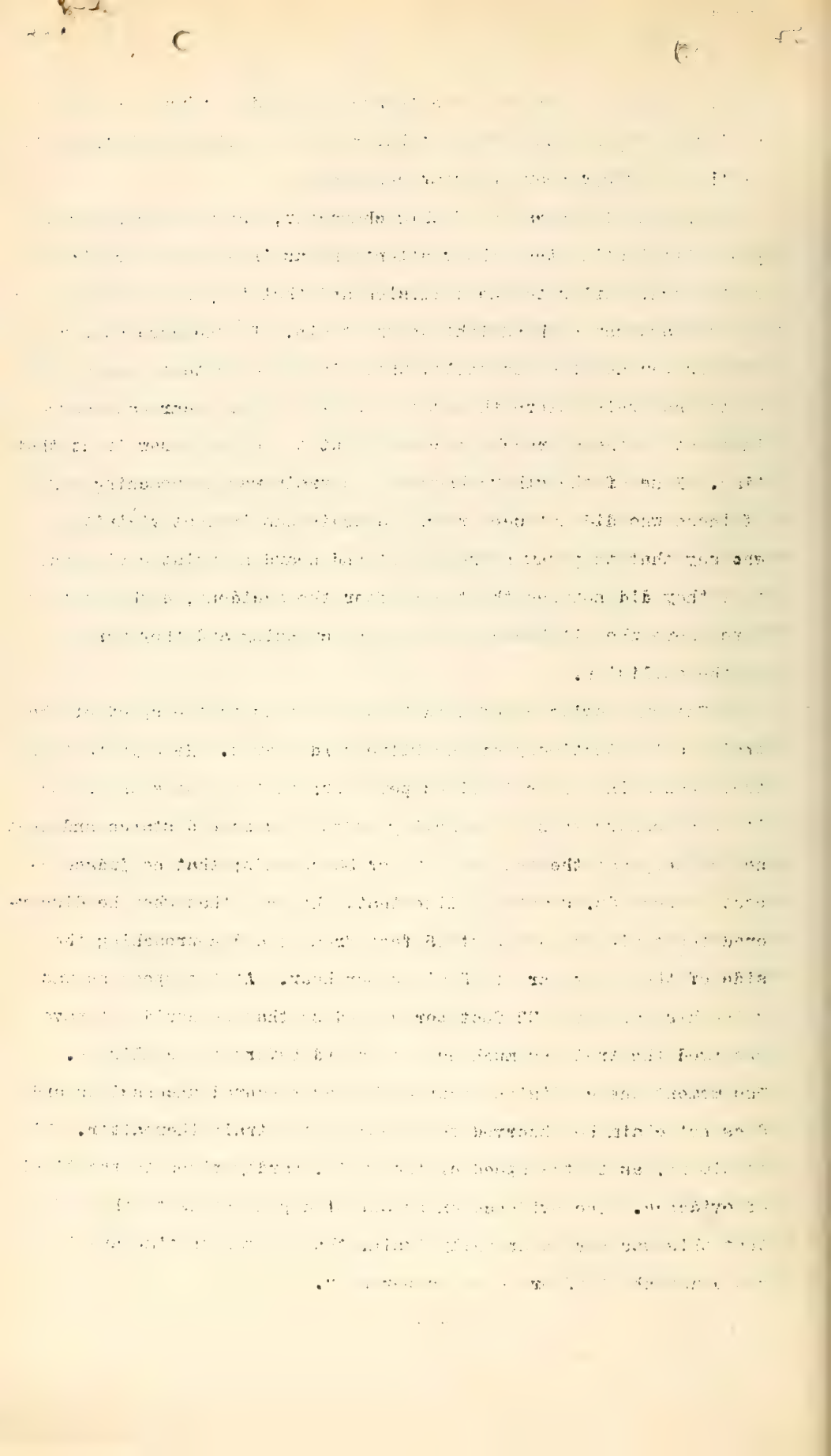
when she came to they got out of the car and walked to the crossing. He says that about five minutes after he reached the crossing he tried to stop a car going west but did not succeed. That he went back to his car and drove it over the crossing and turned around so that its lights shone on the scene of the accident. He says that the Cutrell car came along and stopped about ten minutes after the accident. He says that his wife first saw the train and called his attention to it, but he heard it whistle for the crossing, but did not notice as to the headlight. Mrs. Seibert says she heard the whistle and saw the lights on the train. The father of young Mr. Broyford testified that Mrs. Seibert told him the facts were otherwise in that regard.

If the testimony of the Seiberts is true, the Cutrell car must have been more than ten minutes behind the Seibert car. The fact that no one in the Cutrell car saw or heard the train before the accident, or heard the crash of the collision tends to show that it was farther away than the occupants say it was. There is much positive testimony from the trainmen and people living in the vicinity of the crossing to the effect that the whistle was sounded for the crossing; that the headlight threw a bright light far ahead of the train; and that it was lighted as the train approached and passed over the crossing as well as when it stopped and backed up over the crossing. It is evident that the Seiberts saw and heard the train as they approached the crossing from the west. The driver of the car in question and those in the front seat had just as good an opportunity for seeing and hearing the train as the Seiberts did. For more than 200 feet before they reached the crossing there was not a thing to obstruct their view. If they were quiet, as they say they were, and took any reasonable precaution, we are at a loss

to understand why they failed to see the train or hear the noise of its approach until a moment before they collided with the side of the motor car near the rear end thereof.

Ordinarily in cases of this character, the witnesses for the plaintiff testify that their attention was in some manner directed to the train prior to the collision and that they heard no bell or whistle and saw no headlight on the train. In the case at bar no witness for appellee testified that his or her attention was directed to the train before the front end of the motor car had passed in front of the approaching car and but two of them saw it at that time. None of the others knew that a train was approaching. Some of those who did not see or know a train was in that vicinity and who say that they saw no headlight and heard no whistle also say that they did not see the train after the accident, although they were there when it backed up over the crossing and they were not in the collision.

The only evidence offered by appellee as to the speed of the train is the testimony of the witness Adelhardt. He says that the train was going 40 or 45 miles per hour; that to judge the speed it is necessary to see the moving object for some distance and that he probably saw the train for 20 or 30 seconds; that he judged about 20 seconds, something like that. He says that when he discovered the train he was about 15 feet from it and approaching the side of the motor car at 15 miles per hour. At the speed he was going his car moved 22 feet per second so that he could not have observed the train as much as one second before the collision. The moment the collision occurred he was rendered unconscious and does not claim he observed the speed of the train thereafter. His testimony, as to the speed of the train, hardly rises to the dignity of evidence. The evidence on behalf of appellant is to the effect that this was a regular daily train, that it was on time and its speed was about 25 or 26 miles per hour.



From a careful consideration of the entire case, it is our opinion that the verdict is so manifestly against the great weight of the evidence in the record it would be an injustice to permit it to stand. The deceased sat at the right of the driver in front with at least an equal opportunity to observe the danger of the approaching train. It was no less her duty than that of the driver to observe and avoid danger, if practicable, and to warn the driver. There is not the slightest evidence that she did anything at all. The circumstances are much the same as in the case of Opp vs. Pryor, 294 Ill. 538 where the court held it was reversible error to give an instruction substantially like the one given for appellee in the case at bar. We are unable to distinguish this case from that and hold that the court erred in giving appellee's instruction.

We are of the opinion that the court did not err in refusing appellant's refused instructions. In so far as they were proper they were covered by others given at its request. For the reasons aforesaid, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported.

W. J. F. Gillham Trial Judge
Holder & Bullington - Appellant atty.
Barin, Jr. Appellee atty.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM A.D. 1923.

Filed

March 10, 1924

Term No. 54.

Agenda No. 19.

CLARENCE KRUEGER,
Appellant,

VS.

CITY OF BELLEVILLE,
Appellee.

APPEAL FROM

ST. CLAIR CIRCUIT

COURT.

245 I.A. 646

Barry, P.J. - Appellant sued to recover damages for the destruction of his Buick roadster. He charged in his declaration that appellee permitted 95th street near the bridge where said street crosses over the railroad tracks to be in a dangerous and unsafe condition for travel, in this, that many uneven places and depressions were suffered to be and remain therein; that while driving his car with due care and caution upon and along said street he ran into and upon said portions of the street which were rough and uneven and contained depressions and his automobile by reason thereof was thrown to the right side of the street into a deep depression, and by reason thereof his car was broken and he was unable to control and guide the same, and as a result thereof his car was thrown with great force against the side of the bridge and plunged down the embankment and was greatly damaged, etc.

The accident occurred on 94th street just north of the bridge over the railroad tracks. The street is wide and the surface consists of dirt and cinders with a concrete gutter, curb and sidewalk along the west side. The gutter and curb adjoin the sidewalk to a point about 30 or 35 feet north of the bridge

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Am. Chem. Soc. 1964, 86, 1101-1102.

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1. *Phragmites australis* (Cav.) Trin. ex Steud.

... ..

Journal of Management Studies, 19(1), 67-80.

... ..

where the gutter terminates and there is, a covered drain. Between that drain and a point even with the north end of the bridge the surface of the street is several inches higher than the gutter but is practically even with the surface of the remainder of the street. The wagon bridge is wide enough for two cars to pass readily, and the foot bridge, or sidewalk is about 8 feet west of it. The evidence was to the effect that there were many small depressions in the traveled portion of the street varying in depth from one to four inches.

At 9:30 P.M. on Nov. 11, 1922, appellant approached the bridge from the north driving his car and another car with bright lights was coming from the south which crowded him to ^{the} west with his right wheels on the concrete gutter. The cars met about 60 feet north of the bridge and appellant says that he was then going hardly eight or ten miles per hour, and that the road on the west side was rather rough [&] except the gutter. He says that after he passed the other car he attempted to pull up on the roadway but his front wheels kept skidding to the right and he went on in that way until he hit the drain or catch-basin at the end of the gutter. That when his car hit that place his head struck the top of the car, that he was stunned a little and lost control of the car. That at some point he put on both brakes but the car went on, broke through the guard railing between the two bridges and went down the embankment. He does not say whether his lights were [&] returned on and admitted that he was familiar with the conditions in a general way.

The declaration does not charge appellee with negligence in the location or construction of the drain or catch-basin. He did not testify that his car struck a rough place and was thrown into the depression caused by the location and construction of the catch-basin. His testimony is that after the other car passed he tried to pull up on the [&] roadway but his

front wheels kept skidding to the right and he went on until he hit the catch-basin. He does not say what caused the skidding of his car. He knew his right wheels were on the concrete gutter and knew the conditions in a general way. If he was not driving at more than 8 or 10 miles per hour and was in the exercise of reasonable care it is inconceivable how the accident could have been caused by the negligence charged.

A city is not required to keep its streets perfectly smooth and absolutely safe. If reasonable care is used to keep them in a reasonably safe condition it has performed its duty under the law. The evidence offered by appellant with all reasonable inferences to be drawn therefrom required a verdict for appellee and if the case had been submitted to the jury and a verdict returned in favor of appellant it would have to be set aside. That being true the court did not err in directing a verdict., Ferrero vs. Knights of Security, 309 Ill. 476. The judgment is affirmed.

AFFIRMED.

Not to be reported.

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ATTORNEYS

Geo. A. Crow. Trial Judge.

4. Cook - Appellant Atty: STATE OF ILLINOIS
4. Mudge, Appellee Atty. APPELLATE COURT
FOURTH DISTRICT.

FILED

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OCTOBER TERM A.D. 1923.

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Term No. 57

Agenda No. 7.

Charles Pauley, et. al.)
Appellees.)

vs)

County of Madison,)
Appellant.)

Appeal from Madison

Circuit Court.

245 I.A. 646 #2

Barry, P.J. - Upon a trial before the court without a jury, appellees recovered a judgement of \$5750.00 on account of services rendered in the preparation of plans and specifications. A former judgement for \$5062.50 was reversed by the Supreme Court in 288 Ill. 255. In that case the court said: - "The County Board gave authority to its building committee to secure the services of competent architects to prepare plans and specifications for alterations and improvements of the court house, as specified in the report of the building committee on Dec. 1. 1909. By virtue of that authority the committee on Dec. 6 1909, entered into the contract with plaintiffs to prepare plans and specifications for the contemplated addition to the court house. There was authority to make the contract and it was ratified and confirmed by the board". It also appeared in that case, as it does in this, that after appellees were well under way with the preparation of plans and specifications there was a public protest against the proposed improvement of the old court house. Thereupon the board decided to build a new one. The building committee then instructed appellees to prepare plans and specifications for a new building but the court held that the committee was without authority and the board had not ratified the action of the committee in that

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SEAL OF ILLINOIS
COURT

IN SENATE

THURSDAY, A.D. 1938.

Appeal from Madison
County.

... recovered a judgment of \$3750.00 on account of ...
... rendered in the preparation of plans and specification ...
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... In that case the court said: "The ...
... Board gave authority to its building committee to ...
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... way with the preparation of plans and speci- ...
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... The building committee then instructed ...
... prepare plans and specifications for a new building but the ...
... court held that the committee was without authority and the ...
... had not ratified the action of a committee in that

regard. The court further said: - "For any services rendered in pursuance of the contract to make plans for an addition to the court house according to the proposition submitted by the building committee to the board of supervisors and adopted by the board the plaintiffs would be entitled to recover. This is so notwithstanding the fact that the plans were afterward changed by direction of the committee and the unauthorized order was given to prepare the plans for a new court house. The evidence furnished no information as to the time when the change was made or the amount or value of the work done in pursuance of the contract in making plans and specifications for the addition".

Upon the last trial appellees proved the making of the original contract, the time when the change was made and confined their proof to the value of the services rendered in pursuance of the contract in making plans and specifications for the addition to the court house. There is no conflict in the evidence as to the value of such services and no complaint that the amount allowed is excessive. We find no reversible error in the court's rulings on evidence or propositions of law and the judgement is affirmed.

AFFIRMED.

not to be reported.

The following information is furnished as to the time when the work was made on the amount or value of the work done in pursuance of the contract in making plans and specifications for the building.

On the last trial appellees proved the making of the contract. When the change was made and completed, the value of the services rendered in pursuance of the contract in making plans and specifications to the Court House, there is no conflict in the evidence as to the value of such services and no complaint is made as to the value of such services.

APPEALED.

STATE OF ILLINOIS.

APPELLATE COURT

4TH. DISTRICT.

OCTOBER TERM, A.D. 1923.

J.C. Eagleton Trial Judge
Don & Thomas -
er, Kramer & Campbell.
appellants attys
Farth
Appellies. Atty.

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Robert B. Rol
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 69.

AG. NO. 59.

ROBERT BURGESS, Admr. & Co.,
Appellee,

VS.

SOUTHERN RAILWAY CO.,
Appellant.

APPEAL FROM

WAYNE CIRCUIT

COURT.

245 I.A. 646 #

Barry, P. J. - Appellee recovered a verdict and judgment for \$1500.00 for the death of his intestate who was killed in a grade crossing accident on the Main street crossing in the village of Wayne City. He charged appellant with negligence in failing to ring a bell or sound a whistle as required by statute and the running of its train at a greater rate of speed than 8 miles per hour in violation of a village ordinance. He averred that deceased was in the exercise of ordinary care and was struck and killed by appellant's train and that she left certain children and grand children as her next of kin.

Main street runs north and south through the center of the village and is intersected at right angles by Robinson Ave. Appellant's tracks cross both of said streets at that intersection in an easterly and westerly direction with Robinson Ave. North of the tracks west of Main and south of them east of Main street. Deceased was about 60 years of age, and on July 5th. 1922 approached appellant's tracks from the north and on the east side of the crossing and was struck and killed by a fast train going east.

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The train men say the speed was about 25 miles per hour. Many of the witnesses on both sides say it was from 25 to 40 miles per hour. A village ordinance limited the speed to eight miles per hour. There is the usual conflict as to whether the statutory signals were given with one exception. On direct examination both the engineer and fireman testified that the bell was started to ringing about 1000 feet west of the depot and that it rung continuously until the train stopped after the accident. If so the law was complied with because the depot is 362 feet west of the crossing. On cross-examination, however, they both said the bell was turned on about 1000 feet west of the Main street crossing. In that case the law was not complied with. Neither of them saw the deceased or knew that she had been struck until the conductor stopped the train about three-quarters of a mile east of the crossing. There can be no question but that the negligence charged against appellant was fully established by the evidence.

It is insisted that the court erred in admitting the ordinance in evidence. The statute contains several provisions with reference to the mode of proving an ordinance, and it is argued that appellee failed to comply with any of such requirements. At the time the ordinance was passed, and published in 1891, the Statute (J & A. P.1354) provided:- "The clerk shall record, in a book to be kept for that purpose, all ordinances passed by the City Council or Board of Trustees, and at the foot of the record of each ordinance so recorded shall make a memorandum of the date of the passage and of the publication or posting of such ordinance, which record and memorandum, or a certified copy thereof, shall be prima facie evidence of the passage and legal publication or posting of such ordinance for all purposes whatsoever."

Appellee called the village clerk, who identified the ordinance record kept by the former clerk and that portion of the said record pertaining to the passage and publication of the ordinance in ques-

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1. The first part of the document is a list of names and addresses, which are arranged in a columnar fashion. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list includes names such as "John Doe", "Jane Smith", and "Robert Brown", along with their respective addresses.

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tion was offered in evidence. Many objections were made by appellant thereto, but no objection was offered on the ground that the foregoing statute was not complied with. In its brief and argument in this court appellant argued that the said statute only applied to cities having a population of more than 100,000. In its reply brief it admits it was mistaken in that regard and the only reason suggested as to why the proof was not sufficient under that statute is that appellee offered the ordinance, not as a record of the ordinances, but as a certified copy and as such it was insufficient. We find that the evidence shows that the ordinance record kept by the clerk was identified and from it the ordinance and the memoranda required by the statute were introduced. We might say that in 1917 said section of the statute was amended so that it no longer applies to cities having a population of more than 100,000. No valid objection to the introduction of the ordinance has been shown.

It is earnestly insisted that deceased was guilty of contributory negligence. Two or three witnesses testified that she was carrying a parasol and when about 15 or 20 feet from appellant's main track she stopped and looked to the west in the direction from which the train was approaching. Presumably she must have seen or heard the train. Several witnesses for appellant testified that when she was crossing appellant's switch, and others that when she was five feet or so from the switch, the engine was at the depot 362 feet away. The south rail of the switch was eight feet three and one-half inches from the north rail of the main track. The engineer could have seen her 100 feet ahead of the engine but he did not. The fireman was down putting in a fire and he did not see her, but no alarm signal was given. The statutory signals were not given. Under those circumstances the train was driven through the village and across its principal streets at a speed 4 or 5 times that which was allowed by the ordinance.

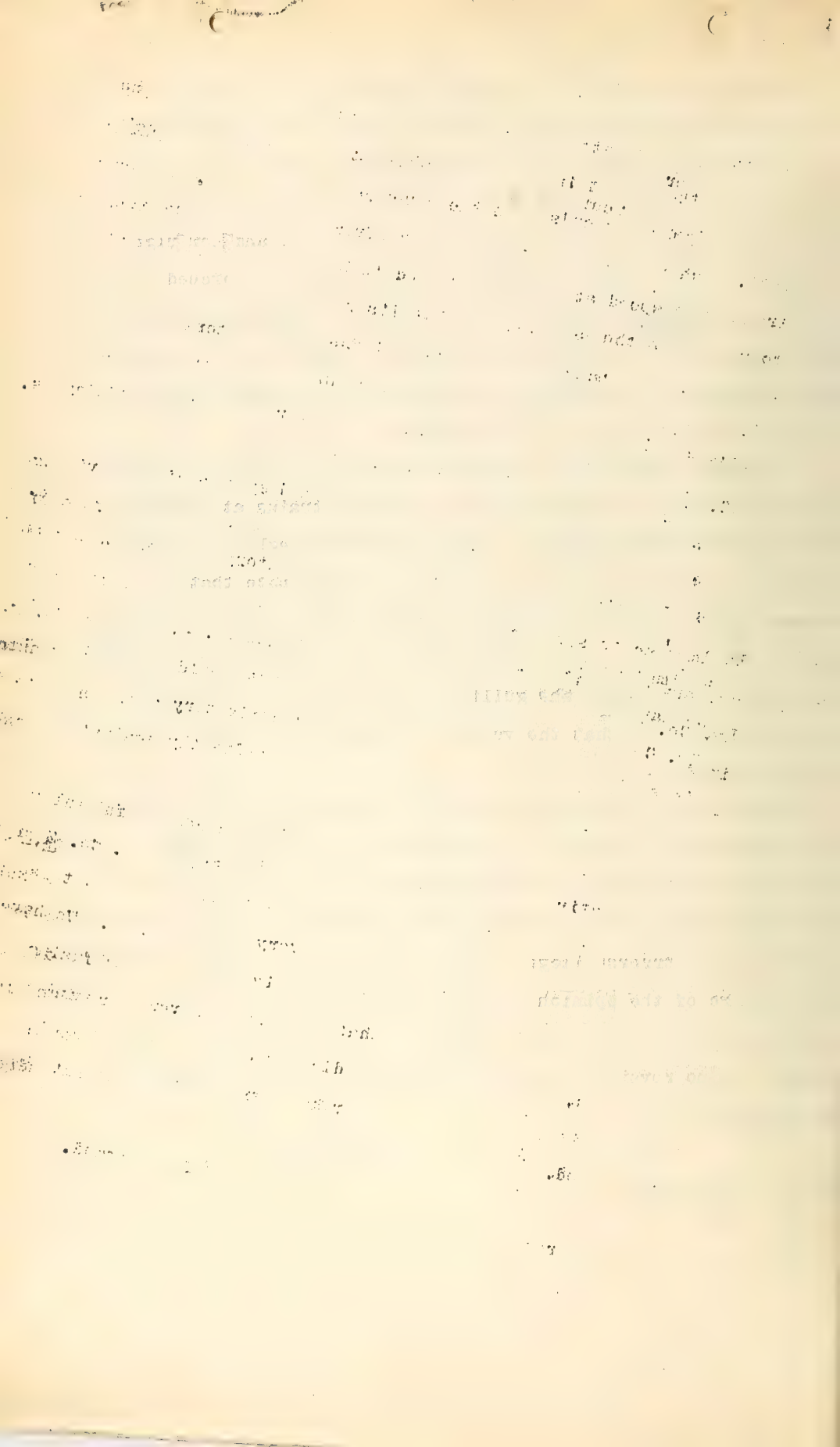
Whether the attempt of appellee's intestate to cross the track at the street intersection while a train was approaching was negligence depends upon the circumstances shown by the evidence, such as, the apparent distance from her of the approaching train, the speed at which it seemed to be running, and her right to rely upon the probability that its speed would not exceed that allowed by ordinance. These are all facts or matters of law and fact combined and the question whether she was guilty of contributory negligence is, therefore, a question for the Jury, *Boddeley vs. C. C. C. & St. L. Ry. Co.*, 150 Ill. 328.

A person approaching a railroad crossing in a city or village may presume that the company will not run its trains at a rate of speed prohibited by ordinance, and contributory negligence cannot be imputed to such person for a failure to anticipate that the company would violate the ordinance, *Dukeman vs. C. C. C. & St. L. Ry. Co.* 237 Ill. 104. Under the evidence we would not be warranted in saying that deceased was guilty of contributory negligence as a matter of law, or that the verdict is manifestly against the weight of the evidence.

The contention that the verdict is excessive is fully answered in the negative in *Dukeman vs. C.C.C. & St. L. Ry. Co. Supra.* The deceased left lineal relations who were entitled to some substantial damages and the verdict is very moderate. We have carefully considered the errors alleged in the giving and refusing of instructions and are of the opinion that the jury was very fully and fairly instructed, and that the court did not err in its rulings in that regard. As no reversible error has been pointed out the judgment is affirmed.

Affirmed.

Not to be reported.



7) *Hon. S. M. Ward, Trial Judge*
Masis & Pulverman } attorneys for appellants.
Layman & Johnson }
Ray C. Martin, Appellee Atty.

245 I.A. 646 #4

Term No. 11

Agenda No. 41.

6042
STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT.

OCTOBER TERM, A.D. 1923.

THE PEOPLE OF THE STATE OF ILLINOIS)
ex rel ROY C. MARTIN, State's Attorney)
in and for the County of Franklin)
and State of Illinois,)
Defendant in Error.)

Error to the County Court

VS

of

JOSEPHINE KUCA,
Plaintiff in Error.)

Franklin County.

Opinion by Boggs, J.

Plaintiff in error, Josephine Kuca, was found guilty of contempt of court by the County Court of Franklin County for the violation of an injunction, enjoining her and one Joe Kuca, her husband, among other things, "from unlawfully possessing intoxicating liquors at any place in the State of Illinois." She was sentenced to the county jail for six months, and fined \$500.00 and costs of suit. It was further ordered by the Court that if, at the expiration of the jail sentence, the fine was not paid in full that the plaintiff in error was ordered and adjudged to work out said fine and costs in the streets and alleys of the city of Benton under the direction and supervision of the commissioner of streets and alleys, at the rate of \$1.00 per day until said fine and costs should be paid in full, and the plaintiff in error to remain in jail while not at work. To reverse said judgement, this writ of error is prosecuted.

The record in this case is practically the same as in the case of the People vs Joe Kuca, the said Josephine Kuca being, as above stated, the wife of Joe Kuca, and both having been ar-

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COUNT

DISTRICT

STATE OF ILLINOIS
County of Franklin
Defendant in Error.

Plaintiff in Error.

vs

THE KUGA
Plaintiff in Error.

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rested at the same time. It is therefore not necessary for us to enter into a discussion of the assignments of error on the record.

For the reasons set forth in the opinion filed in the case of the People vs Joe Huca at this term of court, the judgment will be reversed and the cause will be remanded.

JUDGMENT REVERSED, AND REMANDED.

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Hon. William A. Trues, Trial Judge
B. J. O'Neill *Appellant atty.*
R. G. Tunnell, Jr. *Appellee atty.*

Term No.20.

Agenda No.3.

IN THE
APPELLATE COURT OF ILLINOIS.
FOURTH DISTRICT
OCTOBER TERM A. D. 1923

245 I.A. 646 #5

FILED

MAR 10 1924

Mary Vucich,
Appellee.

vs

National Croatian Society,
Appellant.)

Appeal from the County Court
of

Madison County.

Opinion by Boggs, J.

Appellee, a member of the Wood River Local Lodge of the National Croatian Society, brought suit in a Justice Court of Madison County against appellant to recover sick benefits which she claims are due her from appellant society. The cause was appealed to the County Court of said County where a trial was had resulting in a verdict and judgement in favor of appellee for the sum of \$15.00. To reverse said judgment appellant prosecutes this appeal.

It is first contended by appellant that the Court erred in refusing to direct a verdict in its favor.

The evidence of appellee's witnesses taken as true fairly ^{tended} to prove her case, this being the state of the record the Court did not err in refusing to direct a verdict. Blair vs I.C.R.R.Co. 243 Ill.224-229; Moon vs Aurora, Elgin & Chicago Ry.Co. 246 Ill.56-58.

It is next contended by appellant that the Court erred in its rulings on the evidence. We have examined the record in this connection and find no serious errors in the rulings on the evidence.

Appellant also complains that the Court erred in re-

THE

APPELLATE COURT OF

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fusing one of its instructions, said instruction being as follows: "The Court instructs the jury that if you believe from the evidence in this case that the by-laws and rules of said organization of the defendant provide a way in which its members are governed in their claims for sick benefits, and if you further believe from the evidence that the plaintiff has not complied with such rules and by-laws before bringing her suit in court, then your verdict should be for the defendant."

Said instruction submits to the jury the construction of the by-laws of appellant society and in addition thereto is loosely drawn and its tendency would have been to mislead the jury. The Court did not err in refusing the same.

It is also contended by appellant that the verdict is against the manifest weight of the evidence. The undisputed evidence in the record discloses that appellee at the time in question was a member in good standing, and she had been sick from January 25th to February 10th 1922. The record further discloses that a certificate with reference to her sickness was presented to appellant society with her claim for sick benefits, at the rate of \$1.00 per day, for the time for which she was sick.

Appellant however, contends: First, that appellee is not entitled to sick benefits, for the reason that she was not attended by the Society's local physician, and did not present his certificate in connection with her claim for sick benefits. And Second, that appellee's claim having been rejected by appellant society, it was her duty under its by-laws to appeal her claim to a trial board appointed by the local lodge.

In answer to appellant's first proposition, appellee insists that Dr. Barton, the physician of the local lodge was not in his office when she took sick, and that her husband attempted to call him several times, and was unable to find him;

to appeal her claim to a trial board appointed by the local
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the by-laws and rules of said organization

...to appeal her claim to a trial court organized by the local ... death to February 10th 1982. The record further ...

that by reason thereof she had to procure other physicians to attend her during her sickness.

In answer to the second proposition made by appellant, appellee insists that when her claim was rejected by the local lodge that she requested that her claim be submitted to a trial board but that such request was refused.

Appellant offered in evidence its by-laws. Section 2 of Article 19, provides: "Each member, being a member of the lodge three months and having promptly paid his dues and having performed his duties toward the lodge and the National Croatian Society, shall be entitled, in case of sickness to the sick benefit in the sum of \$1. per day from his lodge. The lodge may increase the sick benefit but in no event decrease it."

Section 11 of said Article 19, provides: "In case the lodge shall not pay to the member the sick benefit when a member has a physician's certificate and behaved according to the by-laws, during the time the lodge to be brought before the lodge trial board, which trial board shall make investigation as to whether the lodge or the member is in the right. The verdict of the trial board shall be read at the first meeting, and the lodge as well as the member shall have the right of appeal to the high trial board, within the designated time set forth in article XIII of the lodge by-laws."

There were other sections of the by-laws of appellant society, which referred to its physician and provided in effect that a sick member must follow his directions.

We are of the opinion however, and hold, that a reasonable construction of appellant's by-laws does not make it a conditioned precedent in all cases that a sick member must submit a certificate from the physician of the local lodge before recovery can be had for sick benefits if the member is otherwise entitled to the same. To hold otherwise would in many cases bar a right of recovery for sick benefits where it would be practically

THE UNIVERSITY OF CHICAGO
DIVISION OF THE PHYSICAL SCIENCES

REPORT OF THE
COMMISSIONERS OF THE
BUREAU OF MINES

FOR THE YEAR 1901

AND THE
PROGRESS OF THE
BUREAU OF MINES

IN THE
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AND THE
PROGRESS OF THE
BUREAU OF MINES

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YEAR 1901

AND THE
PROGRESS OF THE
BUREAU OF MINES

impossible for the sick member to obtain the services of the local physician, by reason of the fact that he might be otherwise engaged, or might be away from his office on business or for pleasure,

On the second proposition made by appellant, the law is, that a member of a society of the character of appellant, impliedly agrees to be bound by its constitution, rules and laws. And where such association has power to hear and determine disputed questions concerning any matter covered by such laws or rules, with a right to appeal to a higher tribunal, within the organization, a member must exhaust his remedies provided by such rules and laws of the society before bringing an action in court. O'Brien vs Rittman, 176 App. 257; People vs Women's Catholic Order of Foresters 162 Ill. 78; People vs Grand Lodge Knights of Pythias, 166 Ill. 71.

But in this case appellee contends that she requested that her claim be tried before a trial board of said society and that her request was denied. The evidence being conflicting as to whether or not such request was made, it was therefore an issue to be determined by the jury, and we are not disposed to disturb their finding as we cannot say such finding is against the manifest weight of the evidence.

Where a member of an insurance society such as the one here involved makes an honest effort to submit his claim to a tribunal provided for, in its by-laws, and is refused such ~~as the one here involved makes an honest effort to submit his claim to a tribunal provided for, in its by-laws, and is refused~~ such right, we hold that he should be entitled to prosecute a suit therefor.

It may be observed in this case that no record of the local lodge was offered in evidence showing the appointment of Dr. Barton as the local physician. In fact, a large amount of the evidence with reference to what took place in the local

lodge in connection with appellee's claim was testified to by parties who happened to be present at the time it was under consideration, but no record of said local lodge was offered, showing the rejection of said claim or anything in reference thereto. However, as no objection was made on the trial that the matters should be shown by the lodge's records, we have considered the case on the evidence submitted.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

JUDGMENT AFFIRMED.

Not to be reported.

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CONFIDENTIAL

Aggr. J. R. Davis, Trial Judge
Paul Taylor Appellant Atty.
Edward C. Craig Appellee Atty.

245 I.A. 646 #6

Form No.29

Agenda No.42.

In the
APPELLATE COURT OF ILLINOIS
Fourth District.

FILED

MAR 10 1924

October Term ,A. D. 1923.

Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

DORTHY L.BOSS,By J.R.BOSS)
her next friend.)
Plaintiff in Error.)

vs)

THE ILLINOIS CENTRAL RAIL-)
ROAD COMPANY,)
Defendant in Error.)

Error to Effingham County.

FILED

MAR 10 1924

OPINION BY BOGGS, J.

Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

This case has been before this Court on two former occasions.

On the first trial at the close of the evidence for plaintiff in error hereafter called Plaintiff, on motion of the defendant in error, hereinafter called the Defendant, the Court directed a verdict in its favor. On appeal to this Court, said judgement was reversed and the cause was remanded, 210 App.p.668.

On the second trial, a verdict was returned for plaintiff in the sum of ten thousand dollars. Defendant prosecuted an appeal to this court, and on hearing, said judgement was reversed and the cause was remanded. 221 App.p.504.

Said cause was again tried, resulting in a verdict and judgement in favor of plaintiff for \$2,000.00. To reverse said judgement, plaintiff prosecutes this writ of error.

A motion made by defendant to strike the bill of exceptions from the files was taken with the case.

It is cintended in support of said motion, that the bill of

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In the

County of Cook

October Term, A. D. 1907

DOROTHY A. ROSS, By _____
her next friend,
Plaintiff in Error.

THE ILLINOIS CENTRAL RAIL-
ROAD COMPANY,
Defendant in Error.

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exceptions was not signed by the presiding judge and filed by the clerk within the time fixed by the order granting the same.

The certificate of the presiding judge is in part as follows:

FORASMUCH THEREFORE, as the matters and things hereinbefore set forth do not otherwise appear of record herein, the Plaintiff DORTHEY BOSS, by her next friend J.R. Boss, tenders this, her bill of exceptions in this case and prays that the same may be signed and sealed by the Judge of this Court before whom the above entitled cause was tried, and be thus made a part of this record herein, according to the Statute in such case made and provided, which Bill of Exceptions the undersigned Judge finds was presented to the undersigned as Judge of said Court on the 20th day of September A.D. 1922 and the said Judge at that time marked the same "presented" and the undersigned Judge hereby certifies that since the 20th day of September A.D. 1922, he has not been asked by the plaintiff to sign and seal the same until the 22nd day of September A.D. 1923.-----

The undersigned Judge further certifies that the Defendant is excepting to the action of the undersigned as Judge, in signing and sealing any Bill of Exceptions as hereinbefore and above set forth, and further excepts to the undersigned as such Judge refusing refusing to set forth herein that all questions except the above seven (7) enumerated questions, were waived on the presentation of the motion for a new trial.

And the undersigned, subject to the objections and exceptions of the defendant as aforesaid, signs and seals the above as the Bill of Exceptions in this case on this the 13th day of October A.D. 1923, and it is further ordered that the Clerk of the Circuit Court of Effingham County, Illinois, file this Bill of Exceptions nunc pro tunc as of September 20, 1922.

(Signed) F.R. Dove (SEAL)
Judge

Counsel for defendant concedes that said bill of exceptions was presented within the time specified, but they insist in their brief that "it was afterwards held for over a year by counsel for plaintiff in error before any attempt was made to have the same signed, sealed and filed," and that therefore the same was not signed and filed within a reasonable time after the trial, or within a time authorized by law. We have examined the record and find that the evidence failed to show that counsel for plaintiff held said bill of exceptions after the same was presented to the trial judge. We have no right to draw that conclusion from the mere fact that he may not

have requested the trial judge to sign the same after it had been presented. The certificate recites that plaintiff tendered said bill of exceptions,"and prays that the same may be signed and sealed"and be made a part of the record as provided by statute. This being the state of the record, and there being nothing to show that the trial judge did not retain said bill of exceptions from the time presented until finally signed, the failure to sign the same within the time specified cannot be charged against the plaintiff. Hawes vs People, ex. rel. 129 Ill. p. 123; People vs Rosenwald, 266 Ill. p. 548; Hall vs Royal Neighbors, 231 Ill. p. 185; Hill Company vs N.S.G. Co. 250 Ill. p. 242; City of East St. Louis vs Vogel, 276 Ill. p. 490; Sullivan vs Ohlhaber Company ²⁹¹ Ill. 359.

The trial court was warranted in ordering said bill of exceptions filed nunc pro tunc as of the date the same was marked presented. Hall vs Royal Neighbors, Supra, p. 192; Sullivan vs Ohlhaber, Supra, p. 363; and cases there cited; Hill vs U.S.G. Co., Supra, p. 245; People vs Rosenwald, Supra, p. 552.

It might be further observed that counsel for defendant were insisting that only seven grounds were urged as grounds for a new trial and that the trial judge should so certify and that on this hearing no other grounds should be considered. The trial judge refused to so certify so that phase of the matter is not before us for consideration.

The motion to strike said bill of exceptions is denied.

The evidence with the reference to the occurrence of the accident and the physical injury to the plaintiff, is substantially the same as on the former trial.

It is first contended by counsel for plaintiff that the verdict is so grossly inadequate that, for that reason alone, the judgement should be reversed and the cause remanded.

It is only in rare instances that judgement in personal injury cases are reversed on the sole ground that the damages awarded are

inadequate, as the amount of damages in that character of cases is a question peculiarly for the jury. *Hackett vs Pratt*. 52 App. p. 346; *Hamilton vs P.C.C. & St. L.R. Co.* 104 App., 207; *Bowles vs B & N Ry. Co.* 130 App. p. 263.

While the verdict on the whole appears moderate, we would not be inclined to reverse the judgment for that reason if there were no errors in the record, the probable tendency of which would be to affect the amount of the verdict.

It is further contended by counsel that the court erred in admitting the record of the County Court of Cook County adjudging one Charles Brown, a second cousin of plaintiff, an insane person and ordering his commitment to the hospital for the insane at Kankakee, and in admitting the record of the County Court of Shelby County, adjudging one Vernon Pope, a first cousin of plaintiff, to be a feeble-minded person and committing him to the hospital for the feeble-minded at Lincoln, for the reason that such persons were collateral kindred further removed in relationship than allowed without proof that such insanity in the one case, and feeble-mindedness in the other, were hereditary. In support thereof counsel cite, *Martin v. Beatty*, 254 Ill. pl 615.

In that case the court in discussing the admissibility of this character of evidence, at page 618 says:

"We held in *Dillman v. McDaniel*, 222 Ill. 276, that if there is evidence tending to show mental unsoundness, it is competent to show the insanity of a testator of blood relationship no farther removed than uncles and aunts, without making proof that it was hereditary in its character, citing many authorities in support of this conclusion."

There was a sharp conflict in the testimony of the expert witnesses as to whether the convulsions the plaintiff was having were the result of her traumatic injury as claimed by her counsel or were hereditary as contended for by counsel for the defendant.

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This being the state of the record we are of the opinion and hold that the Court committed reversible error in admitting said records in evidence, as logical tendency thereof would be to affect the amount of the verdict.

We further hold that the record of the proceeding in reference to Charles Brown is not properly admissible even if it should be shown that his insanity was hereditary as there is no contention on the part of the defendant that the plaintiff is insane.

We also hold that before the record in reference to Vernon Pope can properly be admitted in evidence (his relation to the plaintiff being further removed than that of uncle) there must be proof made that his feeble-minded condition is hereditary. Dillman v. McDaniel, supra; Martin v. Beatty, supra.

Counsel for plaintiff also contend that the court erred in overruling their objections made to the hypothetical questions asked of the expert witnesses who testified on behalf of the defendant. One of the contentions being that the hypothetical questions included, among other things as a basis for the same, the clinical record above mentioned, and also the respective records finding the said Charles Brown to be insane, and the said Vernon Pope to be feeble-minded. In view of what we have already said this objection is well taken.

It is also contended that said expert witnesses invaded the province of the jury, in that they stated conclusion that should have been drawn by the jury. We have examined the record in this connection and are of the opinion that, to a certain extent, this objection is well taken and should be avoided on another trial.

It is next contended by plaintiff that the court erred in its rulings ^{on} of the instructions.

One of the ~~issues~~ ^{points} involved was as to whether or not

Planters Avenue, in said City of Effingham, crosses the right of way of the defendant railroad company. In this connection the Court gave defendants' instructions 10, 12 and 14, which are as follows:

10. "The Court instructs the jury that if you believe from the evidence that Planters Avenue was laid out as a public street on each side of the right of way of the defendant and did not ~~cross~~ it, then and in that case, although you may believe from the evidence that the defendant has allowed people to cross there for their convenience, this of itself, would not extend the street across the tracks.

12. The Court instructs the jury that the plat introduced in evidence by the plaintiff and made by Andrew J. Galloway, does not show any street at Plaintiff's avenue across the right of way of the Illinois Central Railroad Company, and in deciding this case you will have no right to consider that plat as showing a street across the right of way at that point.

14. The Court instructs the jury that you will have no right in determining whether Planters Avenue, as a street, extended across the right of way of the defendant, to consider the flagman or gate ordinance.

An examination of these instructions discloses that the court therein eliminated from the consideration of the jury, facts and circumstances in evidence which were proper for the jury to consider in determining whether or not Planters Avenue extended across the defendant's right of way. C. & A. R. Co. v. Heinrich, 157 Ill. p. 388; Union Stockyards Co. v. Karlik, 170 Ill. p. 403; C. & A. R. Co., v. O'Neill, 172 Ill. p. 527; P.C.C.&St.L. Ry. Co. vs. Bobson, 204 Ill..pp. 254-263; Village of Peotone v. I.C.R.R.Co. 224 Ill. p. 101.

In Union Stockyards v. Karlik, supra, the court at page 407, in discussing a question of this character, says:

"What is competent proof of the existence of a public

the Court gave Hernandez, Rosendo's step-son, \$10,000.00, and

10. "The Court," *White House*, 1964, p. 10.

100-443887-100

1. The Government of the United States of America, hereinafter referred to as the "Government,"

... ..

street or highway in a case like this? It has never been held that the introduction of a plat or other documentary evidence that a street has been legally laid out and opened, or that it has been established by dedication or prescription, is necessary. Any proof which tends to show that it is used and called or recognized as a public street is competent. (Chicago and Alton Railroad Co. v. Heinrich, 157 Ill. 388.) Generally it is sufficient to prove that the injury occurred on a certain street by name, as "State Street," "Clark Street," etc. Here plaintiff, and another testifying on his behalf, expressly state that the accident occurred on Loomis street, but it is insisted that the fact that they speak of the place as Loomis street amounts to nothing, because they show, on cross-examination, that they had no personal knowledge of the existence of the street. A witness may not, in one sense, know, of his own knowledge, of the location of a street, and yet be warranted in calling it a street."

The Court therefore erred in giving each of said instructions.

By instruction 15 given on behalf of the defendant, the jury were instructed that unless they should find that Planters Avenue "as a street, extended across the right of way of the defendant at the time of the injury complained of, you will have no right to consider the question as to whether or not the bell was rung or the whistle blown on this engine."

The giving of this instruction was erroneous, for the reason that the evidence in this case discloses that people frequently crossed defendant's right of way at the point where plaintiff was injured, and that school-children, in going to and from the schools, frequently crossed the same at this point, and that these matters were matters of common knowledge and were known to the defendant and to its servants. It was therefore a question for the jury as to whether or not it was the duty of the defendant company to give warning of the approach of its engine by

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for the jury as to whether or not it was the duty of the defendant

to give warning of the approach of the engine by

by ringing the bell or sounding the whistle, especially in view of the fact that there was evidence in the record tending to show willful and wanton conduct on the part of defendant's agents in the operation of said engine.

In defendant's instruction 21 the jury were told that before the plaintiff could recover she must prove by a preponderance of the evidence that her injuries were the "natural, proximate and immediate result of the plaintiff's having been struck by the engine of the defendant." It is strenuously insisted by counsel for the plaintiff that the word "immediate", as used in this instruction, would have a direct tendence to cause the jury to draw the conclusion that there could be a recovery for only such injuries as the evidence tended to show were at once apparent after the accident, and that they would have no right to take into consideration the fact that some three or four years following the injury, plaintiff suffered from convulsions, provided they should find that the same were the result of said injury.

Ordinarily, the word "immediate" in an instruction of this character, has practically the same meaning as direct or proximate. but we are inclined to the opinion, and hold that in this case, the use of the word "immediate", in addition to the words "direct and proximate" would have a tendency to mislead the jury and the court therefore erred in giving the same.

It is also contended by counsel for plaintiff that the court erred in giving instruction 5 on behalf of the defendant. We have examined this instruction, and are of the opinion that the court did not err in giving the same.

It is also insisted that the court erred in giving instruction numbers eight and eleven, but we are inclined to the opinion that under the pleadings in this case, there was no reversible error in the giving of these instruction.

It is next contended by plaintiff that a new trial should

especially in the case of the defendant's agent, who is a person of known character and whose conduct is to be judged by the standards of a reasonable man.

The court further stated that the defendant's agent was not a person of known character and whose conduct is to be judged by the standards of a reasonable man.

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be granted for newly discovered evidence, to the effect that the Charles Brown is now a well person, and that said insanity proceedings followed an injury from which he had fully recovered and that he was only confined in the hospital for a short time. In view of our holding to the effect that such record is not admissible this assignment of error becomes unimportant.

It is further contended by counsel for plaintiff that he was deprived of an opportunity to poll the jury, for the alleged reason that the court received the verdict at from 8 to 8:15 o' clock in the morning, whereas court had adjourned until 8:30. The record discloses that the verdict was received in open court, and that the court convened at 8:30; as per order of adjournment. Records of courts import verity and cannot be disputed by ex parte affidavits on a motion for a new trial. Vol. 7 R.C.L. 1018; Street R. R. Co. vs. Morrison, 160 Ill. pp. 288-290; Roche vs. Beldam 119 Ill. 320-325; Nicholson v. Loeff, 253 Ill. pp. 526-527.

It is further contended by counsel for the plaintiff that counsel representing the defendant was unfair in his methods of cross-examination and otherwise in the trial of said cause. We have examined the record in this connection and are of the opinion that counsel for defendant did so offend, but the record also discloses that counsel for plaintiff was guilty of similar conduct, though possibly not to the same extent. Before counsel can complain of matters of this character, he must see to it that his own conduct is not subject to like criticism. Maxwell v. Durkin, 185 Ill. 546-547; Brant v. C. & A. R. Co. 294 Ill. pp. 606-621; Purinton v. Belt R. Co., 204 App. pp. 382-392.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and Remanded.

Not to be reported.

SECRET

Hon. George A. Shaw. Trial Judge.
Mc Glynne & Mc Glynne Atty for Appellant
Pape & Priemeyer, Appellee Atty.
2451.A. 647#1

Term No.46.

Agenda No.51.

In The
Appellate Court of Illinois.
Fourth District.

October Term, A.D. 1923

Filed

March 10, 1924

Josephine Oulvey,
Appellee.

vs

R.L.Spicer, Ruth E.Spicer,
John MORTON, Julia Morton,
Gus Dabler and Henry T.
Renshaw, Trustee.

Appellants.

Appeal from Circuit Court
of
St.Clair County.

Opinion by Boggs, J.

On September 25th, 1922, appellee filed a bill in the Circuit Court of St.Clair County to foreclose a mortgage on certain residence property in the city of East St.Louis. The Chancellor found the equities for appellee, and entered a decree of foreclosure. To reverse said decree, an appeal was perfected to this court by John Morton and Julia Morton, who as owners of the premises covered by said mortgage, were made parties defendant in said proceedings.

On March 26th, 1917, MR. & Mrs. Spicer, being indebted to Henry T. Renshaw in the sum of \$4,000.00, executed a promissory note therefor, payable to the order of Henry T. Renshaw, Trustee, three years after date. A mortgage on the real estate herein involved was executed by the Spicers, the then owners of said premises, to secure said note, and said mortgage was duly recorded On March 27th, 1917. On June 7th, 1917, Renshaw sold and

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CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

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delivered said note and mortgage, for a valuable consideration, to one Eugene Oulvey, who retained possession thereof until his death on August 9th, 1918, when the same passed, under his will, to appellee, his wife. Appellee thereafter held possession of said note and mortgage, up to the time of the filing of this bill. Interest was collected on said note by Eugene Oulvey during his life time, and after his death by appellee, up to March 26th, 1922.

In May, 1918, the Spicers sold the premises in question to appellants, for the sum of \$5,200.00. In closing the transaction, no money changed hands, but the Mortons, who were holding a demand note for \$2,600.00, executed by J.R. Renshaw's sons, delivered the same to Renshaw as cash, and executed a note for \$2,600.00, payable to Renshaw, and secured by a mortgage on the premises here involved. Renshaw gave Spicer a check for \$1,200.00, being the difference between the \$4,000.00 mortgage and the \$5,200.00 purchase price for said premises. In the same transaction, the Spicers executed a warranty deed to the premises, conveying the same to appellants.

Following this transaction, on May 8th, Renshaw executed a release of the \$4,000.00 mortgage, and sent the same, together with the mortgage executed by appellants, and the deed to them from the Spicers, to the Recorder's office of said County for record. A few days later, Renshaw procured a certificate of title from an abstract company, which he exhibited to Mrs. Morton, showing the title to said premises in the Mortons, subject only to their mortgage of \$2,600.00. Renshaw kept the interest paid to Oulvey on the \$4,000.00, until March, 1922. Thereafter the firm of J.W. Renshaw's Sons became insolvent.

The record discloses that Mrs. Morton knew at the time of purchasing the property in question that it was incumbered. Both Spicer and Mrs. Morton testified, in effect, that the \$4,000.00 mortgage was to be paid off and released so that the deed from the

Spicers to the Mortons would convey the property free and clear of all incumbrances; that Renshaw was to attend to the matter of freeing the property from said incumbrance. The evidence further shows that Eugene Oulvey, the owner and assignee of the \$4,000.00 note and mortgage, had no knowledge whatever of the sale of the mortgaged property to the Mortons, and likewise had no knowledge of the release of the \$4,000.00 mortgage by Renshaw.

The main defense urged by counsel for appellants against the foreclosure of said mortgage or trust deed, is that Eugene Oulvey failed to record an assignment of said mortgage, and likewise failed to notify the makers of said note and mortgage of such assignment. It is urged that neither the purchasers nor the Spicer, the mortgagors who sold said property, had any knowledge of the assignment of said note and mortgage, and that since said mortgage was in favor of Henry T. Renshaw, Trustee, his release thereof would be binding; that the position of appellants in the transaction is that of innocent purchasers for value, and that they are entitled to protection in a court of equity, as against the claim of the assignee of said note who failed to record an assignment of said mortgage or to give actual notice thereof to said mortgagors.

The first question to be determined is as to whether Renshaw was the agent of Oulvey, the holder of said note and mortgage, in receiving payment thereof and in releasing said mortgage of record.

The law is that a person is not bound by the act of another who assumes to act for him and in his behalf, where he has neither authorized the assumed agent to do the act, nor conferred apparent authority upon him. *Fortune v. Stockton*, 182 Ill. 454-458; *Ortneier v. Ivory*, 208 Ill. 557-581; *Stiger v. Bent*, Ill. 111, 328-337; *Insurance Co. v. Eldridge*, 102 U.S. 545.

The record in this case wholly fails to disclose that

Renshaw was the actual agent of Oulvey, the holder of said note; neither does it disclose a relation between said parties from which it could be legally implied that he was such agent with authority to receive payment of said note and to release the mortgage securing the same. The mere fact that Oulvey purchased said note and took an assignment thereof, carried with it no authority to Renshaw to collect the principal thereon, especially in view of the fact that said note and mortgage were in the possession of Oulvey.

The next question to be determined on this record is as to whether or not the Hortons were innocent purchasers for value, so as to enable them to hold said premises free and clear of said mortgage indebtedness. To this point, counsel representing the respective parties direct their main arguments. Counsel for appellants, in order to sustain their contention that appellants were innocent purchasers, cite a line of authorities holding that the assignee of a mortgage takes the same subject to all defenses which could be maintained by the mortgagors against the mortgage existing at the time of the assignment of the mortgage. Counsel for appellee do not question the soundness of the holding in these cases, but contend that the facts in the present case do not bring it within the principle laid down in the cases cited. We are inclined ^a to the opinion that this point is well taken. The record here fails to disclose any defense existing in favor of the mortgagors in said mortgage at the time the note and mortgage in question was assigned to Oulvey, but as far as the record discloses, said note and mortgage was a valid and subsisting lien against said premises for the full amount thereof. The doctrine that the assignee takes the note subject to all defenses in favor of the mortgagor therefore does not apply to this case.

While appellant John Morton testified that he had no actual notice of the existence of said mortgage, he had constructive notice thereof, as said mortgage was a matter of record.

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While appellant John Morton testified that he had no actual notice of the existence of said mortgage, he had constructive notice thereof, as said mortgage was a matter of record.

As here⁵before stated, Mrs. Morton had actual knowledge thereof. This being true, it was their duty, as purchasers of said premises and having knowledge that they were subject to a mortgage indebtedness, to require that such note and mortgage be satisfied before consummating said transaction by the payment of the purchase money.

The law further is that payment to a trustee of a note secured by trust deed in which he is the trustee, is not to be presumed to be with the authority of the owner thereof, unless such trustee at the time is in possession of the same. *Stiger v. Bent*, supra, 337; *Fortune v. Stockton*, supra 461; *Ortneier v. Ivory*, supra, 581. In *Stiger v. Bent*, supra, the court at page 338 says: "Where the agent has the possession of the promissory note after due, it may be inferred that he has authority to receive payment of it, but the burden is on the debtor who makes payment to the agent, relying upon such inference, to show that the promissory note was in his possession when the payment was made. (*Williams v. Walker*, 2 Sandf. Ch. 325; *Haines v. Pahlman*, 25 N.J. 179; *Smith v. Kidd*, 68 N.Y. 130; *Jones on Mortgages*, 2d. ed. sec. 964.). The fact that the note was neither surrendered nor offered to be surrendered, under the circumstances, is prima facia evidence that he did not then have it. *Heuse v. Conisby*, 1 Ch. Cases, 93, ---and see like ruling, in principle, by this court in *Lucas et. al. v. Harris*, 20 Ill. 169; *Mayo v. Moore*, id. 428; *Keohane v. Smith*, et. al. 97 id. 156." And in *Fortune v. Stockton*, supra, the court at page 461, in discussing this question, says:

"It is practically the universal custom to take up and cancel notes when they are paid, and for one who is authorized to collect, to have possession of the notes and be able to surrender them. Adams did not have possession of these notes, and we think it has uniformly been considered, under like circumstances, that there is no appearance of authority to make the collection.

Here an agent has possession of a note that is due,

it may be inferred that he has authority to receive payment of it, but such an authority could not be inferred from that fact in a case like this, where the paper was not due. Where a trustee releases a trust deed and receives payment of the debt without actual authority and without producing the securities, the party paying has notice of the want of power in the trustee. (Cooley v. Willard, 54 Ill. 68; Stiger v. Bent, 111 id. 528.) The inference of authority to receive payment arising from the possession of the securities is founded upon such possession, and it does not exist without possession. 1 Am. & Eng. Encyc. of Law, (2d. ed.) 1026".

A point was made by counsel for appellants that the cases referred to were cases to where the party to whom the payment was made was merely a trustee, and that the note secured by the trust deed was not by its terms payable to him, as in the case at bar. We do not understand that the rule that the purchaser must see to it that the party assuming to collect the mortgage indebtedness shall have power so to do, is confined to that line of cases. In Keohane v. Smith, 97 Ill. 156, the court had under consideration a mortgage made directly to the payee of the note, and which said note he had assigned and delivered, together with the mortgage securing the same, to a purchaser for value. In discussing the same, the court says, page 159:

The note of Sullivan to Runyan was a negotiable instrument, under our statute. It was for a definite sum, was payable absolutely on a day named, and was not dependent upon any contingency, either in regard to the event, or the fund out of which payment was to be made, or as to the party by or to whom payment was to be made. These are qualities of negotiable paper both at common law and under our statute. The assignment of the note by the payee to complainant was an assignment in equity of the mortgage by which it was secured. Complainant became the bona fide assignee and holder of the note, for value, long before maturity,

and as to her Sullivan could make no defense, either at law or in equity. He knew his note was outstanding, and if he paid it to a party not the holder, it was at his own risk as to whether such party would apply the money in payment of his outstanding note. Smith had notice of the same facts before he effected the loan on the same property for his principal, the owner of the indebtedness secured. He had actual notice of the existence of the mortgage, and that it was on record. It described the note, and from the description contained in the mortgage he must be held to have had notice that the note secured was not due. Being negotiable paper, he must have known it might ^{have been} assigned in the usual course of business, and might then be in the hands of an innocent holder for value. Under the circumstances it was his duty to have informed himself whether the outstanding note the mortgage secured had in fact been paid. Not to do so made it possible for the mortgagee to practice a fraud on the assignee of the note."

It would therefore seem to follow from a consideration of the cases cited that it was the duty of appellants to see to it that Renshaw, in receiving payment of said note and in releasing said mortgage, had either actual or implied authority so to do. Having failed to do this, they must suffer the loss incident thereto.

It should ^{be} further observed that appellants made no examination of the records concerning this property before surrendering the Renshaw note and executing the mortgage to him for \$2,600.00. The certificate of title secured by Renshaw, showing the property free and clear of incumbrance, except the mortgage for \$2,600.00, was not exhibited to appellants for several days after they had paid the consideration for said premises. The release of the mortgage held by Oulvey was not recorded until the next day after the Mortons had parted with the consideration for the premises. It therefore follows that this case does not come within the

rule that innocent purchasers, relying on the public records, shall be protected.

This is a case where one of two innocent parties must suffer a loss, and following the rule laid down in *Anderson v. Ware*, ^{supra}, that "where one of two innocent persons must suffer loss, he who by his negligent conduct made it possible for the loss to occur must bear it," we hold that the negligence of appellants in paying for the premises in question without a surrender and satisfaction of the note and mortgage outstanding, requires that the loss incident thereto be borne by them.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

not to be reported.

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Hon. J. F. Gillham - Trial Judge
My. Gault & Powell
Guss & Guss *appellants atty.*
Appellee atty.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

Filed

March 10, 1924

OCTOBER TERM, A.D. 1923.

TERM NO. 51.

AGENDA NO. 36.

PHOEBE ANN NAYLOR, Administratrix
of the Estate of Thomas W. Naylor,
Deceased,

Appellee,

VS.

ST. LOUIS, SPRINGFIELD & PEORIA
RAILROAD,

Appellant.

245 I.A. 647 #2

APPEAL FROM THE CIRCUIT

COURT OF MADISON COUNTY.

BOGGS, J. - This is an appeal from a judgment for ten thousand dollars (\$10,000.00) rendered in the Circuit Court of Madison County against appellant, in favor of appellee as administratrix of the Estate of her husband, Thomas W. Naylor, deceased.

The declaration consists of three original and one additional counts. The first count charges general negligence in the operation of appellants train. The second count charges appellant with negligence in the operation of its said train across McGowan Crossing at a high and dangerous rate of speed. The third count charges negligence in failing to give reasonable warning of the approach of said train to said crossing. The additional count charges that appellants negligently caused and permitted a bank of earth ten feet in height with weeds thereon three feet in height, to be and remain within and on the south side of its right of way immediately east of said crossing, and that the same obstructed the view of persons traveling on the highway, approaching from the south.

To said declaration appellant filed a plea of the general issue, and a special plea averring that McGowan Crossing is under the jurisdiction of the Public Utilities Commission, and that said Commission by a general order designated this particular crossing as

extra hazardous, and directed the placing of "Stop" signs on each side thereof; that these signs had been placed by the Highway Commissioner as directed by said order; that the occupants of said automobile violated the statute in approaching said crossing, and driving past the said "Stop" sign without bringing their automobile to a full stop before they proceeded over said crossing and that such failure was the direct cause of the injury and death complained of in the declaration.

The cause was tried, resulting in a verdict and judgment as above set forth.

It is first contended by counsel for appellant that the Court erred in refusing its motion for a directed verdict, made at the close of appellee's evidence and then again at the close of all the evidence, it being the contention of counsel that the evidence wholly fails to support the allegation of due care on the part of appellee's intestate just prior to and at the time of the accident, and also that the evidence wholly fails to support the charge of negligence set forth in any of the counts of said declaration.

The record discloses that at about 5:15 on the morning of September 18th, 1922, appellee's intestate, with his son George W. Naylor, and a man by the name of Peterman, left the village of Troy in a Ford sedan owned by appellee. The son, George W. Naylor, was driving. The occupants of said automobile were all employed in a coal mine near Edwardsville, and were on their way to their work at the time of said accident. The public highway on which they were driving runs north and south, and is crossed by appellant's single track railway, which at this point runs in a north-easterly and southwesterly direction, at an angle of about 58 degrees with said highway.

On the day in question, an electric train appellant's, consisting of a motor car and two sleepers, and running in a north-easterly direction, collided with the automobile in question, at this crossing; said collision resulting in the death of all the occupants of said automobile. The only eye witness to the accident was the motor-man on appellant's train. He testified that he first saw the automobile

about twenty feet south of said railroad track; that there were two persons sitting in the front seat, and that they were looking straight ahead; that the automobile was being driven at about fifteen miles per hour; that they did not hesitate or stop before crossing the track, but looked up at the train just as it struck them. During his examination, he was asked the following questions and made the following answers thereto:

"Q. Did they pay any attention to the approaching car so far as you could tell?

"A. No, not a bit. They drove straight on to the track.

"Q. What, if anything, did they do about the time they got on the track?

"A. The two in the front seat looked up at the car. Looked in my direction, right quick. The train was then not over five or ten feet from the,. There was a collision. The train hit the automobile. The brakes were set and I could do nothing further to avoid striking the machine. Looked like a Ford sedan."

Appellee was permitted, over the objection of appellant, to offer proof to the effect that both appellee's intestate and his son, George W. Naylor, were careful. The testimony in reference to appellees intestate was confined to his being a careful man generally, while the testimony with reference to George W. Naylor was that he was a careful boy and also a careful driver of an automobile. The Court also sustained an objection to a motion to exclude said evidence with reference to the careful habits of appellees intestate and his son, made after the testimony of said motorman had been given. The ruling of the Court thereon is assigned as error.

Where there are eye-witnesses to an injury resulting in the death of the injured party, the jury must then determine from the testimony of such witnesses, and from the facts and circumstances surrounding the injury, whether the deceased was careful or negligent, and

being driven of about fifteen miles

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of a careful driver of an automobile. The first witness

objection to a motion to exclude and the other with

of said motion had been assigned an error.

There were two errors assigned to an error

of the injured party, the jury was

of such witnesses, and then the facts and circumstances

injury, whether the deceased was careless, negligent, and

in such cases evidence of the habits of deceased as to care and prudence is not admissible. C. R. I. & P. Ry. Co. v. Clark, 108 Ill. 113; Petro v. Hines, 299 Ill. 236-239; Ocasek v. C. C. R. Co., 225 App. 350.

Counsel for Appellant contend that there should have been an eye-witness to the approach of the automobile for a greater distance back from said crossing. We hold, in view of the character of the testimony given by the motorman, under the authorities cited, the Court erred in permitting proof of the careful habits of appellees intestate and the driver of said car.

The question then arises as to whether there is any competent affirmative proof in the record that appellee's intestate, just prior to and at the time of said accident, was in the exercise of due care for his own safety. In this connection, counsel for appellee insists that appellee's intestate was the guest of his son, George W. Naylor, the driver of said car, and that therefore the driver's negligence, if he were negligent, is not to be imputed to appellees intestate.

Appellee testified that "at the time he (Thomas W. Naylor) was killed, he was working at Hometrade Mine near Edwardsville. George W. Naylor was my son. On the morning of the accident, I saw them leave Troy; my son was driving the auto. My husband sat in the back seat; he could not drive an automobile on account of his hand. It was my automobile." She further testified that her husband "had been working in the Hometrade Mine about two weeks; went back and forth by auto."

While the evidence does not disclose the age of George W. Naylor, the only conclusion legitimately to be drawn from the evidence is that, at and prior to the time in question, he was living in the home of his father and mother, and that the car in question was being used by him and his father in going to and from their work in said mine. It would therefore follow that Thomas W. Naylor was not the guest of his son, and the doctrine contended for would not be applicable to this case.

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With the evidence of due care out of the record, there is no evidence with reference to what took place just prior to and at the time of the accident, except the testimony of said motor-man and the facts and circumstances surrounding the transaction, as shown by the evidence.

In this connection the proof discloses that, some years prior to the date of the accident, said crossing had been designated as an "extra hazardous crossing" by the Public Utilities Commission. South of said crossing about 400 feet, on the right hand side of said paved road, there was a wooden post with a cross-piece thereon, on which were the words "Danger. Railroad Crossing". Then 208 feet south of said track, on the right hand side of said road going north, there was a round enamel and steel approach sign. About ten or twelve feet south of the track and about two and a half feet north of said concrete slab was a regular "Stop" sign. All of these warning signals were in plain view of the driver of a car proceeding northward toward said crossing.

The statute in this State provides:

"Upon approaching any highway crossing a railroad at grade the person controlling the movement of any self-propelled vehicle shall reduce the speed of such vehicle to a rate of speed not to exceed ten (10) miles per hour. At all grade crossings at which "stop" signs are placed the person controlling the movement of any self-propelled vehicle shall bring such vehicle to a full stop at such 'stop' sign before proceeding over the railroad tracks. Failure to bring such vehicle to a full stop at such a crossing before passing over the tracks of the railroad, as herein provided, shall be deemed a misdemeanor," etc.

Sec. 145b, Chapter 121, Smith's Rev. Stat. Ill. 1921.

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warning signs, the driver of said car proceeded past said "Stop" sign in direct violation of said statute, at the rate of fifteen miles per hour.

Where the proof discloses that a vehicle in which several persons are riding was, at the time of an accident, being driven in violation of law, a presumption arises that all the occupants were guilty of negligence, and if the proof further shows that such negligence was the proximate cause of the injury, it will defeat a right of recovery. *Flynn v. C. C. Ry. Co.*, 250 Ill. 460-465. The law further is that an occupant of an automobile, although not driving the same, has still the duty of exercising due care for his own safety. *Frederick v. C. C. Ry. Co.*, 208 App. 172-177; *Vanek v. C. C. Ry. Co.*, 210 App. 149; *Opp v. Pryor*, 294 Ill. 538-547. Before there can be a right of recovery, there must be affirmative proof in support of the allegation of due care. *Beidler v. Bradshaw*, 200 Ill. 425; *Wilson v. I. C. R. R. Co.*, 210 Ill. 603; *Nuner v. C. C. C. & St. L. R. Co.*, 261 Ill. 505-508; *C. C. C. & St. L. R. Co. v. Sparks*, 122 App. 400-404; *Snodgrass v. Wilson*, 206 App. 425; *Kennedy v. A. B. & St. L. Co.*, 180 App. 146-149. The same rule applies to an invited guest. *Opp v. Pryor*, supra, 547; *Fredericks v. C. C. R. Co.*, supra, 177.

We are therefore of the opinion, and hold that the evidence fails to show that appellee's intestate was in the exercise of due care for his own safety just prior to and at the time of the accident.

It is next contended by counsel for appellant that the evidence in the record wholly fails to support the charge of negligence set up in any of the counts of appellees declaration.

With reference to the speed of said train, the witnesses on the part of appellee placed the speed at from twenty five to thirty-five miles per hour. The witnesses on the part of appellant made a somewhat lower estimate.

The evidence of all these witnesses, in so far as they testified in that connection, was to the effect that said train was being operated on schedule time at about its usual speed. The proof

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Exhibit 200

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We are therefore of the opinion, and hold that the

fails to show that appeal of intestate was in an exercise of

for his own safety that order to be at the end of the

It is next contended

once in the record wholly fails to warrant the granting of

in any of the points of contention

With reference to the speed of said train,

on the part of appellee the speed was placed at

five miles per hour. The witnesses

a somewhat lower estimate.

The evidence of all these witnesses, in so

established in that connection, as to the effect that

be operated on schedule time at about the usual

therefore fails to support the count charging that said train was being operated at a high and dangerous rate of speed.

With reference to whether a reasonable warning was given of the approach of said train, some fourteen witnesses on the part of appellant testified positively that the whistle was sounded. The greater number of them testified that the regular crossing signals were given. Appellee's witnesses testified in reference thereto as follows:

Donald Warnock, a passenger on said train, testified on cross-examination that he had "no recollection as to whether any signals were given. Didn't pay any attention if any were given." This witness also testified that he had been reading, and that the first thing that attracted his attention was the setting of the brakes on the car, which occurred about fifty feet before it reached the crossing. Jasper Johnson was not asked with reference to the signals on direct examination, but on cross-examination testified without objection, "When I heard the whistle blowing we were approaching the crossing--**** It was the ordinary whistle of the car, loud enough to be heard." H. A. Durer on cross-examination testified, "I noticed the whistle blowing; started blowing the whistle something like a quarter of a mile from the crossing, at a whistle post beyond the curve, fifteen or seventeen pole lengths from the crossing. They blew the whistle four times, two medium length blasts at intervals, then they blew a short one, then one long, equally as long as the first two." John Teherington, a farmer residing near said crossing, was not asked with reference to the signals on direct examination, but on being made a witness for appellant testified, "I did not see the train, but heard the whistle and judging from hearing the whistle, about the regular place for the crossing; heard the rumbling noise of the approaching train, then heard the whistle."

These are all of the witnesses on the part of appellee who testified with reference to the blowing of the whistle. All of them testified that the whistle was blown except Warnock, and he

to whether a reliable witness was

It positively that the whistle was continuous
of them testified that the regular crossing
a witness testified in reference to the

a passenger on said train, testified
he had "no recollection as to whether any
but pay any attention to any cars
that he had been reading, and that in
his attention was the setting of the signal
about fifty feet before it reached the
on was not asked with reference to the signal

was the ordinary whistle at the very long whistle
error a direct examination testified to

at a mile from the crossing, at which point beyond the crossing

two men on freight train at intervals, and they also
one long, usually as long as the first one, about
testifying near said crossing, was not asked

in on direct examination, "I did not see
my testifies, "I did not see
from hearing the whistle, from the crossing about 100
heard the whistling noise in the approaching train, and heard

These are all of the witnesses in the case
and testified with reference to the blowing of the whistle.
of the testified that the whistle was blown except in the

testified that he paid no attention to the signals and did not attempt to say what took place just prior to and at the time of the accident. The record also discloses that there was a crossing bell at said crossing, and practically all the witnesses who testified in connection therewith, testified that said bell was operating at the time in question.

We are therefore of the opinion, and hold that the record discloses that reasonable warning was given of the approach of said train, and that the evidence fails to support the third count of appellee's declaration.

On the fourth or additional count, the record discloses that there is an embankment about eight or ten feet in height upon the right of way, but an examination of the evidence in the record will disclose that the embankment was not the proximate cause of the injury in question, as the evidence discloses that the driver of an automobile, when opposite said stop sign, could see down said track 1000 to 1400 feet.

In *Easley, Admx., v. Jackson, Receiver*, 212 App. 642, this Court held that where there were signs indicating the presence of a railroad crossing which could have been seen for some distance along the line of travel by the occupants of an automobile approaching the railway crossing, it cannot be said that weeds on the right of way were the proximate cause of the collision.

Other errors were assigned on the record, but in our view of the case it is not necessary to discuss the same.

For the reasons above set forth, the judgment of the trial court will be reversed. We find as the ultimate facts in the case to be incorporated as a part of the judgment, that the evidence fails to prove that appellee's intestate was in the exercise of due care for his own safety just prior to and at the time of the accident, and that it also fails to prove that the appellant railway company was guilty of negligence as charged in any of the counts of appellee's declaration, which proximately contributed to the injury in question.

Judgment reversed, with finding of fact.

Not to be reported.

Hon. Sydney M. Ward, Trial Judge.
H. R. Dial, Appellant Atty.
Ray C. Martin, Appellee Atty.

245 I.A. 647 #3

Term No. 1.

Agenda No. 56.

Appellate Court,

Fourth District.

October Term, A.D. 1923.

FILED

MAR 10 1924

Robert B. Roy
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

THE PEOPLE OF THE STATE OF

ILLINOIS,

Defendants in Error,

v.

CHARLES LESEFSKY and LUCY

LESEFSKY,

Plaintiffs in Error.

Error to County Court of

FRANKLIN.

Opinion by Higbee, J.

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Upon trial before a jury in the county court of Franklin county, plaintiffs in error were found guilty under an information of one count charging that on November 3, 1922 in said Franklin county they did "unlawfully have and possess intoxicating liquor, contrary to form of the statute" etc. This writ was sued out to reverse the judgment entered on that verdict.

The first ground urged for a reversal of the judgment is that the court erroneously permitted officers to testify as to what they found upon a search of plaintiffs in error's premises. It is claimed that the search warrant under which the search was made was irregularly issued and was not regular in form and that it should have been quashed by the court. It appears to me from an inspection of the complaint for search warrant and the warrant itself that they were sufficient to warrant the search but waiving that, the record does not show that plaintiffs in error made any preliminary motion that the court investigate the

October Term 1935.

attribution?

(continued on next page)

of the eggs of the same species.

regularity of the search warrant, or the legality of the seizure of the property, or that the court ordered the property, claimed to have been illegally seized returned to them. In the cases of People v. Mosley and People v. Cummings, decided by this court, in which opinions are filed at the present term, it was decided that in the absence of such preliminary motions of objections made before the trial, evidence obtained by the officers without any search warrant was properly admitted. Following the rule laid down in those cases we hold that even though the search warrant in this case may not have been regular, yet evidence obtained thereunder was properly admitted because no objections thereto was made before the trial.

It is also urged that the information is insufficient and that the court erroneously overruled the motion to quash the same. The information is substantially the same as the informations in the cases of People v. Mosley; People v. Smith; People v. Cummings; People v. Martin and People v. Moore, decided at the present term of this court. The same criticism is made of this information as was made of the information in each of the above mentioned cases. We held those informations were sufficient and those decisions must control in this case. We therefore hold the trial court did not err in overruling the motion to quash. The verdict in the case was warranted by the proof and the jury fully and accurately instructed as to the law.

The judgment of the court below is accordingly affirmed..

~~Error, ed/~~

Affirmed

Not to be reported.

legality of the search warrant, or the legality of the seizure of the property, or that the court ordered the property, claimed to have been illegally seized returned to them. In the case of *People v. Mosley and People v. Cummings*, decided by this court, the opinions are filed at the present term, it was decided that the absence of such preliminary motions or objections to the trial, evidence obtained by the officers without a warrant was properly admitted. Following the rule laid down in those cases we hold that even though the search warrant in this case may not have been regular, yet evidence obtained therefrom was properly admitted because no objections were made.

People v. Martin and People v. Moore, decided at the present term of this court. The same criticism is made of this information as of the information in each of the above mentioned cases. We held those informations were sufficient and those decisions were affirmed in this case. We therefore hold the trial court was warranted by the proof in the jury and was instructed as to the law.

The judgment of the court below is accordingly affirmed.

Attest, 1905

Han. A. D. Morgan, Trial Judge
Justin & Tightly set
Chas. H. Thompson, Appellate atty.

245 I.A. 647 #4

APPELLATE COURT,

STATE OF ILLINOIS.

FOURTH DISTRICT

OCTOBER TERM, A.D. 1923.

Filed March 10, 1924.

Term No. 9.

Agenda No. 20.

The People of the
State of Illinois.

Defendant in Error.)

vs.

Icy Cummings,

Plaintiff in Error.)

Error to the County Court

of

Saline

County.

Opinion by Higbee, J.

Plaintiff in Error was tried and convicted under an information which charged that on December 26th. 1922, at and within the County of Saline in the State of Illinois he "unlawfully then and there possess intoxicating liquor in violation of the Illinois Prohibition Act, contrary to the Statute in such case made and provided, and against the peace and dignity of the same people of the State of Illinois!"

It is urged by Plaintiff in Error that the information does not charge the commission of a criminal offense, and that the Court erred in overruling a motion to quash the same. This information is in substantially the same language as the informations in the cases of the People vs George Mosley, and People vs Otis Smith, in which opinions have been heretofore filed by this Court at the present term. The same criticism was made to the information in each of those cases, as is made in this case.

VERIFICATION

STATE OF ILLINOIS

IN SENATE

Illinois

in Error.

Error to the County Court

of

County.

Saline

Plaintiff in Error.

Saline vs. Hesse

Plaintiff in Error was cited and served with summons and return.

which charged that on December 28th, 1888, the

Saline in the State of Illinois, unlawfully then

possessed of the same.

Act, contrary to the Statute in such case

and provided, and against the peace and against the same

of Illinois.

Plaintiff in Error, the return does

show that the defendant committed the criminal offense, and that the

court tried in overruling a motion to quash the same. This in-

formation is substantially

in the cases of the People vs. George Mosley, and People vs

Otis Saline, in which opinions have been heretofore filed by this

Court at the present term. The same division was made to the in-

cases, as is now

The informations were held sufficient in those cases, and what was there said by this Court must control in this case, and we therefore hold this information sufficient. It is insisted that the jury was not drawn or selected in the manner required by the Statute and that the judgment should be reversed because the Court overruled a motion to quash the venire and the return thereon. The record shows that the jury was secured to try the case before plaintiff in error had exhausted his preemptory challenges. The same objection is urged to the drawing and selecting of a jury in this case as was urged in the case of the People vs Otis Smith Supra. In that case we held that this objection to the jury was not well taken and we must also so hold in this case. The Court admitted in evidence over objection of plaintiff in error a half gallon glass can containing what was claimed to be intoxicating liquor, obtained by the officers from the possession of plaintiff in error. It is urged that the admission of this exhibit was error because it was not shown that the same was obtained by means of a legal search warrant. The record does not show that plaintiff in error made any preliminary motion that the Court require this property to be returned to him or that he moved the Court to make an investigation and order the property returned if it was found that the same had been illegally seized. We held in the case of People vs William H. Martin (opinion filed at this term) that

said by this Court must control in this case, and we there-

Court

be reversed

and the motion to quash the venire and the return

averaging

The Court in error had exhausted his promissory and

ion is urged to the drawing and releasing of a jury

case as was urged in the case of the People

In that case we held that this objection to the jury was

It taken and a mist also so hold this case. The Court

in evidence over objection of plaintiff error a held

obtained by the officers from the possession of the

It is urged that the admission of this exhibit

property to be returned to him so that he moved the Court to make

an investigation and order the property returned if it was found

that the same had been illegally seized. We held in the case of

People vs. William H. Martin wherein filed at this term (1904)

under such conditions such evidence is properly admissible.

It is also contended that the Court committed error in giving defendant in error's sixth instruction. This was an instruction advising the jury as to what constitutes circumstantial evidence and states that the same is sufficient to convict if it satisfied the jury of the guilt of the defendant beyond a reasonable doubt; that the law demands, a conviction wherever there is sufficient legal evidence to show the defendant's guilt beyond a reasonable doubt, and that circumstantial evidence is legal evidence. This instruction is not subject to the criticism made that it directs a verdict without requiring sufficient proof of the facts and circumstances pointing to the guilt of the defendant. The information is sufficient, the proof warranted the verdict of guilty, and no reversible error appears in the record.

THE JUDGEMENT IS THEREFORE AFFIRMED.

It is also contended that the Court's instruction was erroneous.

In error's sixth instruction. This was an instruction

which was to what constitutes circumstantial evidence.

The Court said that the same is sufficient to establish a fact

if the jury of the guilt of the defendant, beyond a reasonable

doubt, the law demands a conviction whenever there is

legal evidence to show the defendant's guilt beyond a

reasonable doubt, and that circumstantial evidence is legal evi-

dence. This instruction is not subject to the criticism made

by the defendant's counsel. It is a correct statement of the law.

The defendant's counsel also contended that the instruction was

erroneous in that it did not require the jury to find the

defendant guilty beyond a reasonable doubt, and no reversible error appears in the record.

THE JUDGMENT IS THEREFORE AFFIRMED.

Appellate Court,
Fourth District.

October Term, A.D.1923.

ARABEL WILSON,

Appellee

v.

EAST ST. LOUIS & SUBURBAN
RAILWAY COMPANY.

Appellant.

Appeal from MADISON.

FILED
MAR 10 1924
Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Hon. J. J. Gillham, Trial Judge.
Burrage & Ryder, App'l. Atty.
Gurs & Gurs, Appellee.

Opinion by Higbee, J.

245 I.A. 647 #5

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This is an action brought by appellee to recover damages for personal injuries sustained by her in a collision between an electric passenger car in which she was riding and a work car, both controlled by appellant, on May 13, 1922. Appellee at that time lived at Granite City and was on her way to visit her parents in Collinsville. The collision occurred between East St. Louis and Collinsville near "Smith's Mound Park." Appellee testified that the first thing she remembered after the accident was that two men picked her up from the aisle of the coach and helped her from the car; that her dress was torn down the middle and on both sides; that after standing at the scene of the accident for a short time, a passerby took her in his sedan car to her mother's in Collinsville; that Dr. Harrison was called as soon as she arrived at her mothers; that she was then quite hysterical; that her only visible signs of any injury were a contusion of the left knee and a cut on her upper lip and near her left eye; that at the time she was suffering no pain but later in the evening her shoulder, arm, hip and back began to ache; that Dr. Harrison called again the next

day and she went to his office after that. She further testified that she returned to her home in Granite City in about two weeks; that she suffered with her back and hip and had night sweats and headaches and was unable to do any of her household work; that she also suffered with dizziness; that her menstrual periods were very irregular, and that after her return to her home she consulted Dr. W. H. Grayson from whom she was still taking treatment.

When the case was called for trial appellant applied for a continuance on the ground of the absence of the above mentioned Dr. M. W. Harrison. The affidavit upon which the motion was based. stated in substance that the doctor had been called to attend appellee at the place in Collinsville where she was taken after receiving her injuries, and carefully examined her; that he found a contused knee and severe bruises on her left arm and a cut lower lip; that there were no fractured bones; that her injuries were superficial and not serious; that she was not seriously or permanently injured; that he examined appellee on different occasions between May 13 and May 26; that on the later date she had practically recovered from such superficial injuries, and that in his opinion as a physician she was not seriously or permanently injured; that the affiant was sick in bed and could not be present in court. Appellee admitted that this witness, if present would testify as stated in the affidavit to the facts concerning the condition of appellee and the court denied the motion for a continuance. In our opinion this action of the court was not reversible error.

It is alleged in the declaration that appellee was thrown with great force and violence to and against the floor of the car; that her left knee, hands, arms and shoulders were greatly cut, strained, bruised and permanently injured; her upper lip cut, bruised and injured; her back wrenched, strained and permanently weakened and in-

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jured; her eyes permanently weakened and injured; that her menstruation periods became irregular and so remained; her stomach so injured as to cause her indigestion and pain; her nervous system so injured as to render her unfit to perform her household duties and affairs; her clothing torn and ruined, and that she was otherwise greatly and permanently injured internally and externally, etc. Appellee called Dr. William H. Grayson as a witness in her behalf. Dr. Grayson testified that he was called to attend appellee in the latter part of May, 1922; that he made a thorough physical examination of her and found that she was then suffering from very severe shock, was very nervous, was suffering from falling of the womb, and that he found a prolapsed uterus and a small ovarian growth. This witness further testified that he did not know how long this condition had existed. Attorneys for appellee then stated to this doctor a hypothetical question describing the collision, appellee's actions and complaints and purporting to contain all the contentions of appellee and then asked the witness to what he would attribute the failed womb and the night sweats, the ovarian trouble and the headaches and dizziness. The witness was permitted to answer this question over the objection of appellant and stated that the natural conclusion would be that these conditions resulted from the collision. There was a conflict in the evidence as to whether or not appellee was injured in this manner by the collision. Her physician stated he did not know how long these ailments had existed and there was some evidence tending to show that the injuries sustained by her were quite superficial. The question as to whether or not the conditions testified to by appellee and her physician were caused by the accident, was the ultimate fact which the jury had to determine. This physician was not asked whether these conditions could have resulted from

this accident but as to whether or not they did result from the accident. Under the rule as laid down by the Supreme Court in the case of Kimbrough v. Chicago City Ry. Co., 272 Ill. 71, it was reversible error to permit this question to be answered.

It appears that appellee at the request of a man and woman, who were really representatives of appellant, accompanied them to bathing and other pleasure resorts under the belief that they were people who were considering opening up a business in Granite City and giving her husband a position. These parties were not placed on the stand by appellant but it was brought out on cross examination of appellee that appellee had had photographs taken at a bathing resort and had participated in certain amusements which appellant claims could not reasonably have been indulged in by one in her claimed physical condition. One of the Attorneys for appellee contended that she did so at the instigation of these parties who were detectives for appellant and he immediately referred to and pointed said parties out in the court room and asked that they be not allowed to leave. In his argument before the jury, said attorney for appellee referred to these people as detectives in very strong language, calculated to create a prejudice against them. Counsel for appellant objected to said statements made to the jury concerning the persons called detectives but the court made no ruling until after they had been repeated in different forms several times, when the court sustained an objection and told the jury to disregard such remarks. Appellant did not deny the negligence with which it was charged, nor did it deny that appellee received some injury. The only question was the extent of her injuries and the damages which she should be allowed. These remarks of counsel as to the parties called detectives, who were not witnesses in the case, were improper and they might well, notwithstanding the final ruling of the court, have prejudiced the jury and influenced the amount of the verdict.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Not to be reported.

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Term No. 49

Appellate Court

Agenda No. 44

Fourth District.

October Term, A.D. 1923.

William S. Rosenberg,

Appellee,

vs

George Nemeth and Dora

Nemeth,

Appellants.

Hon. J. F. Gillham, Trial Judge.

M. R. Sullivan, Appellants Atty.

Jesse Simpson, Appellee Atty.

APPEAL FROM MADISON.

245 I.A. 648 #1

MAR 10 1924

OPINION BY HIGBEE --J.

Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

This suit was commenced by a bill in chancery filed by appellee against appellants on the 13th day of May, 1920. The bill alleged that appellants on the 3rd day of April 1918, being indebted to appellee in the sum of \$1000.00 executed and delivered to him their promissory note of that date for that sum due one year after date with interest at the rate of 7% per annum from date, and providing for the payment of ten per cent of principal as attorneys' fees; that to secure the payment of said note they executed and delivered to him their mortgage deed covering certain property therein described; that the said principal sum of \$1000.00 together with interest thereon from the 3rd day of April, 1918 was due and unpaid, and prayed for the foreclosure of said mortgage. Copies of the note and mortgage were attached to the bill and the date, maturity, amount and rate per cent of interest corresponded with the allegations of the bill. On June 9, 1920, appellants filed an answer to the bill alleging that at the time of the execution of said note and mortgage appellee stated that the note must be executed for one year, but that at the expiration of the first and second years he would renew the same giving appellants three years

in which to pay the principal sum of \$1000.00, and that it was understood they were to pay interest at the rate of 6%; that appellee retained from the \$1000.00 principal, \$180 as interest thereon for three years and also retained the further sum of \$40.00 which at that time he stated was for cost of abstract and attorneys fees; that appellants received only the sum of \$780.00 and denied that any part of said note was due before the 3rd day of April 1921. The answer further alleged that at the expiration of the first year appellee told appellants it was not necessary for them to execute a new note and that there was nothing for them to do until the expiration of the full three years. The answer further stated that there was nothing due appellee at the time the bill was filed, and that he was not entitled to foreclose; that appellants were ignorant of the laws, usages and customs in such matters and understood that the papers executed were for the full period of three years. The matter was referred to a special Master in Chancery who filed his report on March 9, 1923. This report contained the Master's finding as to both facts and conclusions of law. Upon the filing of the report appellants filed an amended answer in which they admitted they were on the 13th day of April 1918, indebted to appellee in the sum of \$1000.00 and executed and delivered to him their promissory note for that amount and the mortgage securing the same; that on that date they borrowed from appellee the sum of \$1000.00 for three years with 6% interest, and that appellee then deducted from the amount borrowed the sum of \$180.00 as advance interest; that appellee represented to appellants that the note could not be executed for three years, but would have to be made for one year and renewed at the end of each year, and that he agreed he would so renew the note so that the loan would extend over a period of three years;

that appellants were not familiar with transactions of that sort and relied upon appellee's representations; that in addition to the \$180.00 retained in advance for interest, appellee retained a further sum of \$100.00 which he stated was for Abstract fees and expenses in making the loan; that the rate of interest agreed upon was 6%; that no rate of interest was inserted in the note at the time it was signed; that the agreement between appellants and appellee was that they were to have three years in which to pay the principal sum of \$1000.00; that the interest was to be 6%; that appellee retained from the amount borrowed the sum of \$180.00 as interest for said three years and the further sum of \$100.00 for cost of abstract and attorneys fees; that appellants were not able to read and understand the English language, were not familiar with the rates and conditions of notes and mortgages and relied upon the statements and representations of appellee that the note and mortgage would be renewed at the end of each year, and that appellant fraudulently caused the same to be made for one year and to bear interest at the rate of 7%.

The answer denied that any attorneys fees were due appellee and that they had made default in any manner and answering further alleged that on the 4th day of April 1921, they tendered to appellee the sum of \$1000.00 which had then become due, but he refused to accept the same and that on the 6th day of April 1921 the appellants paid this tender into the Circuit Court for appellee and that the same is now in the hands of the Clerk of that Court. Said amended answer denied that appellee had any right to foreclose said mortgage prior to April 4, 1921, and also denied that appellee was entitled to any of the relief prayed for. At the same time appellants filed a cross bill setting forth substantially the same facts stated in the answer and praying that the note and mortgage be reformed according to the facts as therein set

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forth, and that complainant's bill be dismissed for want of equity. The Court overruled all objections, approved and confirmed the Master's report and further found and decreed that appellants were on April 3, 1918 indebted to appellee in the sum of \$800.00 for money borrowed for which on that date they executed to appellee their promissory note for the sum of \$1000.00 due one year after date with interest at the rate of 7% per annum; that appellee paid to appellants only the sum of \$800.00 and retained the sum of \$200.00 and that said sum of \$200.00 was retained to pay advanced interest, charges etc.; that appellants have not paid to appellee said \$800.00 or any part thereof or the interest on the same from the date of said loan and that there was due to appellee from appellants the principal sum of \$800.00 and interest on the same at the rate of seven per cent per annum from April 3, 1918 to the date of the decree or a total of \$1099.12. The decree further found that by the terms of the mortgage appellee was entitled to recover his reasonable solicitor's fee, and that the sum of \$110.00 was such a fee. The decree then ordered and adjudged that appellants pay to appellee within thirty days the sum of \$1209.12 together with \$65.00 costs and that in default of such payment the mortgaged premises be sold. Appellants assign many errors and appellee has assigned cross-errors, both sides asking that the decree be reversed. We agree with the contention of the parties that the decree in this case should not be permitted to stand as it is. The pleadings above set forth at some length, indicate the claims of the respective parties and while there is some proof that the parties on both sides were misled by an agent or intermediary who acted as interpreter, and in a manner, conducted the negotiations between them, yet on the whole the contentions of appellants were substantially sustained by the evidence. The proof clearly shows that appellants only

received \$800.00 at the time the loan was made; that the interest on the debt was paid for three years in advance and that it was the understanding of the parties that the loan was being made for a period of three years. This suit was commenced on May 13, 1920, nearly a year before the three years had expired, and while appellee had in his hands the interest on the debt for another year. This is a suit in equity and by all rules of equity and in good conscience appellee cannot here where, the rights of third persons have not intervened be permitted to maintain this suit to foreclose his mortgage instituted before the expiration of the time for which he had been paid to let it run and therefore before any default. The bill was prematurely filed and the decree based upon it cannot stand. The amount tendered by appellants at the expiration of the three years and afterward, upon the refusal of appellee to accept it, deposited with the clerk of the Court, was sufficient to pay the full amount of the debt. The decree is accordingly reversed and the cause remanded with directions to the trial court to enter a decree dismissing the original bill of complaint and directing the tender in the hands of the clerk of said court to be delivered to appellee; and further providing for the delivery of said note and mortgage to appellants and the release of said mortgage on the records and that appellee pay the costs of the suit.

REVERSED AND REMANDED WITH DIRECTIONS.

Not to be reported.

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*Hon. J. C. Eggleston - Trial Judge
C. E. Schwartz & B. D. Anthony, Appellant Atty
James E. Denton, Appellee Atty.*

Term No. 56.

Agenda No. 8.

October Term, A.D. 1923.

FILED

J. T. JOINER,

Appellee

v.

CAVE-IN-ROCK FLUOR-S PAR COM-

PANY, a corporation,

Appellant

Appeal from HARDIN.

245 I.A. 648^{#2}

Opinion by Higbee, J.

---oOo---

Appellee, a physician, recovered a judgment in the circuit court of Hardin county against appellant for the sum of \$394.50, for medical services, rendered one Frank Hicks, an employe of appellant.

It appears from the record that said Hicks received a personal injury on February 15, 1921, while working in the shaft at appellant's mine, in Pope county, Illinois and was taken to his home where appellee was called by some one to attend him. Appellee decided that an immediate operation was necessary to save the injured man's life. He returned to his office for the necessary equipment and secured Dr. F. M. Fowler and Dr. J. S. Cummins to assist him in the operation. Upon their return to the injured man's home, it appears that appellant's superintendent Wallace Milligan had arrived there. The superintendent testified that he refused to permit these doctors to perform the operation, but insisted that the injured man be taken to a hospital either at Rosiclare, Paducah or Evansville, and the operation there performed, and that appellant company would pay the expenses. Appellee testified that upon appellant's Superintendent objecting to the performance of the operation by himself and the two assistants,

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he informed the superintendent that on account of the condition of the roads and the nature of the injury he thought the injured man could not be taken to a hospital; that thereupon the superintendent "told him to go ahead and do the best he could and turn in his bill when the work was over and he would turn it over to the company and see that he got his money." In this testimony appellee is corroborated by the two doctors who assisted him.

This suit was brought by appellee to recover for the performance of that operation and the attention afterwards given by him to the injured man. It is not denied that the superintendent had the authority to employ appellee for appellant nor is the reasonableness of the charge questioned, and no question is raised concerning the admissibility of evidence. The weight of the proof shows that appellant's superintendent authorized appellee to perform the operation on the injured man. Appellant, however, contends that under the workman's Compensation Act it had the right to select a physician and it was under that Act liable only for \$200.00, as the injured person did not go to a hospital. If the Workman's Compensation Act applies to this case appellant is right in that contention since it is clear that both the superintendent and the injured man were shown to have been automatically working under that Act. There is, however, no evidence whatever showing that appellee had submitted himself to the provisions of that act. Under such circumstances it has been expressly held in this state, that such Act does not deprive the circuit court of the jurisdiction of an action by a physician against an employer to recover for services rendered by him, at an employer's request, to an injured employe, although both the employer and employe are shown to be working under the act. Hoyt v. London Guarantee & Accident Co. Ltd. 227 Ill. App. 93; Edwards v. Centralia Coal Co. 227 Ill. App.

453; Augustus v. Lewis 22 Ill. App. 376. The same doctrine is enunciated in Noer v. Jones Lumber Co., 170 Wis. 419 and National Car Coupler Co. v. Sullivan, 73 Ind. App. 442.

In accordance with the laws as above set forth, as applied to the facts in this case, the judgment of the trial court is affirmed.

Affirmed.

Not to be reported.

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Hon. J. R. Dave Trial Judge
G. F. Taylor - Appellants atty
Paul Taylor - Appellee atty

245 I.A. 648 #3

Term No. 61

Agenda No. 50.

Appellate Court
State of Illinois
Fourth District.

October Term, A.D. 1923.

Raymond D. Burk,
Appellee,

vs

LeGrand A. Flack
and E. E. Flack
Appellants,

APPEAL FROM
EFFINGHAM

RECEIVED
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Opinion by Higbee, J.,

Appellants own and operate at Effingham, Illinois a school of photography under the name of the Illinois College of Photography, sometimes designated in the record as Bissell's College. After the exchange of some correspondence appellee arrived at Effingham November 10, 1921 and registered as a student therein. He, at that time, paid \$10.00 laboratory fee and \$125.00 tuition for six months course of study. Upon the register signed by appellee, appears among other things the following: "money paid for tuition or laboratory fee is not returnable at any time or under any circumstances" and also "the students when signing their names in the college record will conform to the rules of this institution and will be governed and regulated by the rules therein. "Appellee began his work in the school on November 14, 1921, and attended about a week when he left for the reason as stated by him that he was out of funds and he had to go to work. He did not return until July 16, 1922, when with the consent of appellants he re-entered the school without any deduction for the week which he had already spent there. He attended until the following October 2. when he had some trouble with another student which resulted in

a fight in one of the rooms of the college. As a result of ~~this~~ trouble he was requested to appear before a faculty meeting at 4:15 on the following day. He did not attend this meeting for the reason as stated by him that the meeting was at 4:15 and he had to go to work in a restaurant at 4:30. He was notified by letter under date of October 4, that for his misconduct on October 2 and for his failure to appear at the faculty meeting on October 3, he had been suspended for a period of one week and was directed in that letter to appear before the faculty at 4:15 on October 10. He did not attend the school during this week, but worked in the restaurant where he was employed and went to the faculty meeting on October 10. At this meeting he was in effect reinstated and was told that if he wanted to come back and behave like a man he could do so. Appellee testified that he went back to the school on October 23rd and later on the 25th he was told that if he would return the following Monday the 30th, day of October, he could start on the course with two other men who were going to start at that time; that on Saturday, he received a telegram calling him to St. Louis, and that he did not return to Effingham until the evening of November 6; that he returned to the school on the morning of November 7 and was there told by one of the teachers that he must get out of the building or he would have him thrown out; that he then went to see one of the appellants and was there informed that he had been suspended, and was told to appear at a faculty meeting at 4:15 that afternoon which he did. At this faculty meeting the City Marshall appeared and appellee was informed that he had been suspended indefinitely. It is the contention of appellee that he was suspended maliciously and without any fault upon his part and this suit was brought to recover tuition and the laboratory fee which he had paid. On trial a verdict was returned by the jury in favor of appellee for \$200.00, but he filed a remittor of \$75.00 and judgment was entered in his favor in the sum of \$125.00, the amount paid by him for his tuition, not including the laboratory fee.

at 4:15 on the following day. He did not attend this meeting
the reason as stated by him. At the meeting
he had to go to work in a restaurant at 4:30.
by letter under date of October 4, that
October 8 and for his last meeting at the
meeting on October 8, he was present at the
week and that he did not attend the meeting before the
at 4:15 October 10. He did not attend the meeting
this week but worked at the restaurant. The restaurant
closed and went to the faculty meeting on October 11. This
meeting he was in effect reinstated and was told that if he
wanted to come back, like a man he would do so.
He testified that he went back to the school on October
and later on the 22nd he was told that if he would
following Monday the 30th day of October, he could
the course with two other men who were going
that on Saturday he received a telegram calling him to
Louis, and that he did not return to Birmingham until the
evening of November 6; that he returned to the school on the
morning of November 7 and was by one of the teachers
that was sent out of the building or he would have him
out; that he then went to see one of the counsel
was informed that he had been suspended.
appear at a faculty meeting at 4:15 and afternoon when he
did. At this faculty meeting the City appeared and
he was informed that he had been reinstated.
it is the contention of the State that he was
tiously and without any upon his part and that he
brought to recover the laboratory fee which he had
paid. On trial a verdict was returned by the jury in favor of
appellants for \$200 but he filed a remittitur of \$125.00 and
judgment was entered in his favor in the sum of \$75.00 the
amount paid by him for his written, not included in the labor-
atory fee.

The testimony in behalf of appellants as to what actually happened at different times covered by the evidence in some respects contradicts that of appellee, but in the main there is no material conflict except appellants contend that appellee was not suspended or expelled indefinitely on November 7, 1922, but was simply told that he had been suspended until he was ready to ~~come~~ back to the college and conduct himself in a gentlemanly manner like the students were expected to do, but that he did not promise to do so, left the school and had never returned.

When appellee signed the register, its provisions and the rules and regulations formed and constituted the contract between him and appellants. Beyond any doubt appellants had the power to adopt and enforce such rules as their governing body deemed expedient for the government of the institution and the courts may not interfere with their enforcements if they do not violate good morals or the law of the land, or unless their enforcement is from malice or improper motives other than the due enforcement of the rules and regulations of the school. (People vs. Wheaton College 40 Ill. 186 and McClintock vs. Lake Forest University 222 Ill. ~~App. 468~~ App. 468.) Under these authorities it appears that if appellants acted with malice appellee had a right to recover. Indeed the case was tried on this theory, the instructions given on both sides recognizing the principle that malice must be proven by appellee to entitle him to a recovery. The proof is close on the question ~~whether the proof is close on the question~~ whether appellants acted with malice, but after a careful consideration of the record we cannot say that the verdict is so contrary to the manifest weight of the evidence that it should be disturbed by this Court.

Taken as a whole the instructions fairly and accurately instructed the jury as to the law applicable to the case and there does not appear to have been any material error in the rulings of the court in reference to the evidence admitted or excluded.

THE JUDGMENT WILL THEREFORE BE AFFIRMED.
AFFIRMED.

at different times covered by the evidence in some
ways contradicts that of appellee, but in the main there is
a conflict except appellee contend that appellee was

he had been suspended until he was ready to come back
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students were expected to do, but that he did not
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it appears that if appellee acted with malice appellee has
right to recover. Indeed the case is on this theory.
instructions given on both sides. The principle
must be proved by appellee to entitle him to
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with malice, but there is no question of the
cannot say that there is no contrary to the manifest
weight of the evidence that it should be sustained by this Court.

Then as a whole the instructions fairly and accurately
instructed the jury as to the law applicable to the case and there
does not appear to have been any material error in the
of the court in reference to the evidence admitted or excluded.

Hon. J. C. Kern. Appellate Judge
Lee & Lee - Appellants atty
Shaw & Huffman - Appellees atty.

Case No. 67.

Ag.No.14

Appellate Court-Fourth District

October Term, A. D. 192²³.

245 I.A. 648 #4

KNOX BANK & TRUST CO.)

Appellant)

v.)

Appeal from Lawrence.

ELMER L. WARNER,)

Appellee)

Opinion by Higbee, J.

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This is a suit in assumpsit brought by the Knox Bank & Trust Company, appellant, against Elmer L. Warner, appellee, to recover on a note for the sum of \$500.00 dated December 20, 1921, purporting to be signed by appellee, payable to himself and endorsed to appellant.

The declaration consisted of two counts. The first count declared specially upon the note and the second consisted of the common counts consolidated. To this declaration appellee filed a plea of non-assumpsit and two special pleas. The first special plea set up that fraud and circumvention had been used in obtaining the making and execution of the note. The second special plea alleged that the note was given in payment for stock of the Hammon Optical Machine Manufacturing Company sold to appellee; that said company was a foreign corporation and had not complied with the requirements of the Securities Law of this State at the time said stock was sold to appellee; and that said stock was never issued and delivered to appellee. Upon the trial of the case a verdict was returned by the jury in favor of appellee, and this appeal has been perfected from the judgment rendered on that verdict.

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Appellee testified that in September, 1921 he became the owner of some shares of stock in the Hammon Optical Machine Manufacturing Company. At sometime prior to December 20, 1921 he received a letter from J. H. Hammon, president of that company stating that the stockholders had voted to increase the capital stock and that a salesman would soon call upon him offering this stock for sale; that about the 20th of December, 1921 this salesman did call upon him and read to him a certificate of stock and also a subscription blank; that the agent read these papers to him because he, appellee, did not have any glasses, and that he paid attention to what he read. He further testified that he agreed to take 5 shares of stock and signed what he understood to be a subscription for that amount of stock at a price of \$500, and paid the same by giving to the agent his check for \$308.50 and two One Hundred Dollar Liberty Bonds. He swore that no note was mentioned; that if a note was signed at that time he did not know it, and that it was covered up in some manner by the agent. The salesman mentioned by appellee was not a witness and the above was all the evidence in the case concerning the execution of this note. Appellant became the owner of the note before maturity and in due course. The jury who heard and saw the witnesses testify found for appellee and the proof is that he was led by the salesman to believe that the instrument he signed was a subscription for stock and this proof is sufficient to sustain the verdict.

It is urged by appellant that there was no plea of failure of consideration but that the court improperly admitted evidence to the effect that appellee had never received the stock for which he subscribed. There is some evidence in the record to the effect that appellee had never received any certificate of stock, but such evidence was admitted without any objection upon the part of appell-

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be a subscriber for that share of stock, and the witness
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and One Hundred Dollars, and the witness testified to the fact
was made, and the witness testified to the fact that the witness
know it, and that it was a share of stock, and the witness
The witness testified to the fact that the witness was not
was all the evidence in the case, and the witness testified to the fact
note. Appellant became a shareholder before
in and course. The jury who heard the witness
found for appellee and the jury who heard the witness
man to believe that the instrument he signed was a
for stock and this proof is sufficient to sustain the verdict.
It is argued by appellant that the witness was not a shareholder
of consideration but that the court improperly admitted evidence
to the fact that appellee had never paid the stock tax which
be subscribed. There is no record to the fact that
that appellee had never received any certificate of stock, but
evidence was admitted without any

ant, and it cannot now be heard to complain of the same.

Only one instruction was given by the court in behalf of appellee. In that instruction the jury was advised in substance, that if it was shown by a preponderance of the evidence that fraud or circumvention or both were used in obtaining the note sued on and that appellee was caused to sign the same because of such fraud or circumvention, the jury should find for appellee. The instruction did not require any showing upon the part of appellee that he used due diligence and care to protect himself against such fraud and circumvention. It has been repeatedly held by the courts of this state that before the maker of the note can defend against a note in the hands of a holder in due course on the ground that fraud or circumvention was used in securing the execution thereof, he must show due care and diligence on his own part to protect himself against such fraud or circumvention. It has ~~even~~ been held that if a person who cannot read signs a note under such circumstances, he should at least have the note read to him by some one present. In this case it was shown that appellee already was the owner of some stock in this company; that he was acquainted with the leading officers thereof, and that he had the salesman read the instrument he supposed he signed to him, so the evidence did in fact show certain diligence and care on the part of appellee. In addition to this the court gave three special and three general instructions for appellant. The three special instructions specially bore upon the question that even though the evidence disclosed that the note had been secured by fraud and circumvention, yet appellant being a holder in due course was entitled to recover unless it was shown by a preponderance of the evidence that appellee used due care and diligence to protect himself. We believe the jury was fully instructed on this question and under the conditions of the proof in this case we cannot hold that the

August 1940 to August 1941, and was released in August 1941.

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failure of the one instruction given in behalf of appellee to embody this element was reversible error.

The judgment will be affirmed.

Affirmed.

Not to be reported.

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Hon. M. R. Sullivan - Trial Judge
H. J. Bandy - Appellant's atty.
R. R. Johnson - Appellee's atty.

245 I.A. 648 #5

Term No.68.

Agenda No.11.

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM A. D. 1923

Madisonville Saw and Planing
Mill Company.

Appellee.

vs

Midland Creosoting Company,
Appellant.

Appeal from City Court
of

Granite City.

Opinion by Higbee, J.

On September 21, 1920, appellant, through J.E.Schwartz, a lumber commission man of St.Louis, ordered from appellee twenty carloads of Long Leaf Paving Block stock at \$32.00 per thousand feet, and on September 24, ordered another twenty carloads of the same material at the same price. Appellant confirmed both of these orders on the same date they were given and identified them on his own files as Orders No.256G and 258G respectively. Appellee is engaged in the lumber business and is located in the state of Louisiana. Upon receiving these orders it placed its orders with various mills in the south for the supplying of the material named. The first car was shipped to appellant on September 29th, 1920 and between that date and December 2nd eight other cars were shipped, which were received and paid for by appellant. Under date of October 26, 1920 appellant wrote appellee as follows:

Granite City, Illinois.
October 26th.1920.

Madisonville Saw and Planing Mill Co.,
New Orleans, Louisiana.

Gentlemen:-

In reference to our order No.258G covering paving stock, we regret to advise that our yard is becoming so crowded with material we must direct you to stop at once further shipments on same until such time as we will be in shape to handle it.

[Faint handwritten notes at the bottom of the page, possibly bleed-through from the reverse side.]

Please understand that it is not our intention to cancel the order, but these instructions are necessitated by the fact that we are not permitted to load any open cars and while our order file is heavy, our output is greatly reduced. At the present writing, we do not know just when this situation will be relieved, so please stop cutting as well until we advise you that you may resume shipments.

Kindly acknowledge receipt and oblige,

Yours very truly,

H.M. Newton,
Vice-President and General
Manager.

This also covers our order No. 256G."

In reply appellee wrote appellant on October 28 as follows:

10-28-23.

Midland Creosoting Company,
Granite City, Illinois.
Gentlemen:-

We have your letter of the 26th instructing us to stop shipments also manufacturing stock on our order No. 256G and No. 258G. We are accordingly instructing our mills by letter as we have this order pretty well scattered and no shipments will come forward later than Saturday or Monday. We shall be unable to carry this order on our files longer than November 10th. If shipping instructions cannot be given us by that date we will consider it cancelled.

Yours truly,

Madisonville Saw and Planing Mill Co.
R.E. Bland,
Sales Manager.

On December 7, appellant wrote appellee again in the matter as follows:

Madisonville Saw and Planing Mill Co.,
New Orleans, Louisiana.
Gentlemen:-

We have written you before asking that you stop shipments on orders for paving block stock, but are writing you again in order to make sure that you will under no circumstances ship even a single car of lumber until further notice. We are going to shut down our plant in about a week or ten days and intend to lay off during that time all our laborers, retaining only some repair men to make necessary repairs to machinery and creosoting cylinders. We will, therefore, not be in any position to unload lumber and we must insist that you be governed by these instructions until we again resume operations when we will be pleased to advise you more definitely about resumption of shipments.

Trusting you will issue necessary instructions to you mill promptly, we are

Yours very truly,

H.M. Newton,
Vice-President and General Manager.

P.S. It is our impression that your order already stands cancelled. However this circular letter will do no harm.

H.M.N."

and that it is not our intention to
these instructions are suggested by the
to load any open cars and while
greatly reduced. At the
just when this
will
please stop writing as well until
advises you
You may
kindly acknowledge receipt and advise
Yours very truly,
H.M. Newton,
- Vice President and General
Manager.

His agent.

Following:

10-28-20

Overseeing Company,
Chicago, Illinois.
We have your letter of the 28th instating us that
manufacturing stock and order No. 2886.
We are accordingly instructing our office to
have this order pretty well covered and no shipment
forward later than Saturday or Monday. We shall be
to carry this order on our files longer than
shipping instructions cannot be given us by that date
consider it cancelled.

Yours truly,

Highlandville Saw and Planing Mill Co.
H.M. Newton,
Sales Manager.

On December 28th you wrote:

again in the

Highlandville Saw and Planing Mill Co.
We will
before making that order ship
ments on order. Having stock but are
to then to that you will under no circumstances ship
lighter until further notice. We are going
to take off all our orders remaining only some
regarding matters. Heavy repairs to machinery and over-
ing equipment. Therefore, not be in any position to an-
load lumber and we must state that you be governed by what
instructions and we again reserve operations when
pleased to advise you more definitely about
ments.

Trusting you will leave us
Yours very truly,
H.M. Newton,
- Vice President and General
Manager.

P.S. It is our intention that your
ed. However this situation letter will be no harm.

Appellee brought suit to recover its profits on thirty one cars not shipped by it.

On trial before a jury a verdict was returned in favor of appellee for the sum of \$1608.00A motion for a new trial was overruled and judgment rendered in favor of appellee for that sum. On trial of the case it was contended by ~~that~~ appellee that the correspondence above set forth shows that appellant rescinded the contract of sale and that appellee therefore had the right to sue for the profits it would have realized on the thirty one cars not shipped. On the other hand appellant claimed that contract was rescinded by appellee. Appellant's confirmations sent to appellee of the orders placed by the commission merchant, Schwartz, stated the shipments were to be made at once. Appellant of October 26 directed appellee, contrary to the original directions, to stop shipments until further instructions from appellant. This order to stop shipment was based upon conditions which were not under the control of appellee. In reply to that communication appellee by letter of October 28, notified appellant that unless shipping instructions were given by November 10th it would consider the order cancelled. Under date of December 7, appellant wrote appellee "under no circumstances ship even a single car of lumber until further notice."

Under the proof referred to we are of the opinion the jury was justified in finding that appellant cancelled or rescinded its order. Appellee, therefore had the election to pursue either one of three remedies: (1) it might treat the contract as rescinded and recover under a quantum meruit so far as it had performed, or (2) it might keep the contract alive for the benefit of both parties, being at all times ready and able to perform, and at the end of the time specified in the contract for performance, sue and recover thereunder, or (3) it could treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits it would

On trial of the case

above set forth shows that

the evidence is

in favor of appellee

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have realized if it had not been prevented from performing the same. This has been the uniform holding of the courts of this state and among the many cases so holding are the Lake Shore and Michigan Southern Railway Company vs Richards, 152 Ill. 59 and Stoneking vs Long 142 Ill. App. 203. Appellee elected to pursue the last of the three courses available to it.

The court gave four instructions in behalf of appellee and appellant urges that these instructions were erroneous because two of them contained the expression "if the jury believe from the evidence" instead of "if the jury believed from a preponderance of the evidence." These instructions are not to be commended or approved but the giving of them in the form named did not constitute reversible error. Our Supreme Court in the case of Donk Bros. Coal. Co. vs Thil, 228 Ill. 233, said of an instruction containing similar words, "This form of expression has been employed so long by courts and lawyers as to become a fixed practice..... The fact that the belief of the jury is based on the evidence is the essential thing. The fact that the jury have a fixed belief based on the evidence, necessarily ~~preponderance~~ ^{preponderance} of the evidence is, at least, in the opinion of the jury, in accordance with such belief."

Furthermore the first instruction given in behalf of appellant was almost wholly devoted to explaining to the jury that the burden was upon appellee to prove its case by a preponderance of the evidence.

Objection is also made that one of appellee's instructions referred the jury several times to the counts of the declaration, without stating what they contained, the concluding statement being that if the jury believed appellant had failed to perform its part of the contract as alleged in either count of the declaration without fault on part of the appellee that appellant would be liable in damages, etc. While the rule is not entirely clear as to the extent, reference to the declaration may be made

Appellate Division

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in instructions. We are of the opinion that under the authority of Kirk & Co., vs Jajko, 224 Ill. 338 and Mallett vs Hood, 201 Ill. 202, such reference to the declaration as was made in the instructions complained of, was not materially objectionable. Appellant complains that the court refused certain of its instructions, but an examination of the three named, shows that they were fully covered by those given for appellant.

Objection is also made that a witness for appellee was permitted to explain what was meant by the language in appellee's letter stating "we shall be unable to carry this order on our files longer than November 10". In answer to this question the witness explained that in the lumber business the word "hold" and the word "cancellation" have very different meanings when used concerning material which has to be specially cut, such as paving block stock. Under the circumstances of this case the admission of this evidence was not error. The objection is, also urged that appellant was permitted to prove that the lumber market declined from the first of October, 1920 to December 17, 1920. Since the controlling question in this case was which if either of the two parties had cancelled the contract, it seems to us that it was proper to prove a motive upon the part of either for cancellation of the same, especially as appellant was contending that the congested condition of its own yard was its reason for asking that shipments be not made until further notice.

In our opinion the proof shows that appellant cancelled the order. No question is raised that the damages allowed are excessive. On the whole the instructions stated the law with substantial accuracy and no reversible error appears in rulings on the evidence.

THE JUDGMENT IS AFFIRMED.

Not to be reported.

245 I.A. 649#1

Term No.74

Agenda No.53.

APPELLATE COURT
FOURTH DISTRICT
STATE OF ILLINOIS.

OCTOBER TERM, A.D. 1923

E.L.Damon,
Appellee.

vs

Board of Education of the
Benton Township High School
Township 6 South, Range 3 West
of the Third Principal Meridian,
Franklin County, Illinois.
Appellant.

Appeal from Circuit Court
of
Marion County.

Opinion by Higbee, J.

This is an appeal by the appellant, the Board of Education of Benton Township High School, of Franklin County, from a judgement of the Marion County Circuit Court, cancelling a bid submitted by appellee to appellant to construct certain improvements to its school building; canceling and annulling a certified check for the sum of \$2600.00 which accompanied said bid; enjoining the bank on which said check was drawn from paying the same; enjoining appellant from collecting said check and from prosecuting a pending suit at law based thereon. The bill alleges in substance that prior to July 26th. 1919, appellant advertised for the construction of certain additions and improvements to the Township High School Building in the City of Benton; that pursuant to said notice appellee secured a copy of the plans and specifications and proceeded with due diligence to prepare his bid for such work and did submit such bid in writing in the sum of \$59,998.00; and in compliance with said notice deposited with his said bid,

his check payable to the order of W.F. Dillon, Secretary of said Board of Education in the sum of \$2600.00 and certified to by the Old National Bank of Centralia, Illinois; that in the preparation of his bid and while in the exercise of due diligence, appellee made a clerical mistake which was not discovered until after said contract had been awarded to him by appellants; that said error was made by him in carrying over the totals of estimates made to him by subcontractors for work and materials to be furnished him in case the contract was awarded to him, and by reason of such mistake the bid submitted by him was \$40,000.00 less than he intended to make it. The bill further alleges that on July 26, 1919, the bids received by appellant for said work were opened; the appellee's bid was approximately \$43,000.00 less than the next lowest bid submitted; that appellee was not present when the bids were opened; that others present at that time called appellant's attention to the fact of the difference between appellee's bid and the next lowest; that there was an error in appellee's bid and that the amount thereon submitted was not the amount intended to be made by appellee; that the architect employed by said board of education at that time advised appellants there was an error in appellee's bid and requested said board not to consider the same, because of the apparent gross error in the amount thereof. The bill also alleges that thereafter and before he discovered said error in the amount of his bid verbal notice was given him that his bid would be accepted; that soon thereafter he discovered such mistake and immediately communicated with appellant's Secretary and declined to let his bid stand; that he sought to correct or rescind his bid; that said communication of his error was made to appellant within twenty-four hours after the acceptance of said bid and before appellants had suffered damages of any kind; that appellee notified appellant that by reason of such mistake his bid was \$40,000.00 less than he intended to make it, and that if they would permit him to increase his bid in the sum of \$40,000.00 he would sign the contract to construct said buildings

in accordance with the plans and specifications, and that such increase would make his bid approximately \$3800.00 less than the next lowest bid submitted. The bill further alleges that appellants knowing the error in appellee's bid wrongfully refused to permit him to amend and correct same or withdraw it but ~~sought but~~ sought to force him into entering into a contract for the construction of the building for the amount of the bid as submitted, and immediately sought to collect said certified check and forwarded the same to the Old National Bank of Centralia for collection; that appellee ^{immediately} served notice on that bank not to pay the check; that appellants had brought a suit in assumpsit for the collection of said note, and that appellants have suffered no damages of any kind or character. The bill prays that the check may be decreed to have no force and effect and that the Court order the same cancelled and surrendered; that the bank be enjoined from paying the same and ~~that the appellant be~~ enjoined from the prosecution of said suit and from the collection of said note, and that they be ordered to produce the check in court that the same might be cancelled and surrendered.

The answer of appellant denies that appellee while in the exercise of due diligence made a mistake in his bid which was not discovered until after the contract had been awarded; denies that by mistake appellee's bid was \$40,000.00 less than he intended to make it; denies that the attention of appellants was called to the fact that there was a difference of \$43,000.00, between appellee's bid and the next lowest, and that appellant's attention was called to the fact, that there was an error in appellee's bid by their architect or any other person, and that the architect requested them not to consider such bid. The answer admits that appellee's bid was accepted and avers that after the acceptance of his bid appellee agreed that his certified check should be attached to said contract, and that he would forfeit the amount thereof if appellant suffered any damage by a breach

of his contract, and that appellee attempted to withdraw or rescind his bid and recover his check, but denies that he discovered any error or mistake in his amount and notified appellants that his bid could not stand and should be rescinded. The answer alleges that appellants have sustained damage in excess of \$2,600.00 by appellee's failure to proceed with his contract.

The Court entered a decree finding the facts substantially alleged in the bill of complaint and granting the relief therein prayed for. Both the said Board of Education and the Old National Bank of Centralia, Illinois were made parties defendant to the bill, only the board of education has appealed from the decree. The proof in this case shows that when bids were opened on the 26th day of July, 1919 there had been submitted four bids. Appellee's bid at that time was approximately \$57,000.00; the next lowest bid was \$103,990.00; the next \$104,000.00 and the fourth \$116,960.00. It appears from the testimony of N.S. Spencer, appellants' architect, that he, at that time, informed appellants there was some mistake in this bid; that appellee could not purchase the materials necessary for the building at the price he had submitted as his bid. Appellee was not present at this meeting which was held in Benton, his home being in Centralia, Illinois. On the morning of July 30th, F.H. Stamper, President of the appellant Board, got into communication with appellee over the telephone and asked him to come to Benton. There is some dispute as to just what was said in this telephone conversation. Appellee testified that he was simply told to come to Benton. Mr. Stamper testified that in that conversation he told appellee his bid was something like \$40,000.00 lower than the others and that the Board desired him to come and check over his figures to see if he had not made a mistake. Appellee reached Benton late that evening bringing with him two of his employes. On his arrival the witness, Stamper, had a conversation with him in which, as he testified, he again told appellee his bid was something like \$40,000.00 less than

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any of the others and that the Board desired him to re-check his figures. Appellee denied that this witness said anything to him about his bid being lower than the others, and the witness admits that no such conversation was had in the presence of the two men who had accompanied appellee. Appellee with some members of the Board and their architect then visited the site of the building and went over the matter. Appellee discovered that he had omitted one of the partition walls and increased his bid to \$59,998.00. As to what occurred at this meeting there is some contradiction. Appellee contends that he was never at this meeting or at any time prior thereto informed that his bid was approximately \$40,000.00 less than the next lowest. On the other hand members of the Board testified that he was so advised. Appellee and the architect both testified that the architect there advised the Board that there must be some mistake as the material for the proposed building could not be purchased for the amount of appellee's bid. The architect further testified that in order to convince the Board he was correct in this statement he exhibited to them some sub-bids which had been submitted to him for materials; so far as he knew appellee was not advised of the difference between his bid and the others. Appellee testified that he did not have with him at this meeting his estimate sheets and that he made his mistake in totaling up the sub-totals of his estimate sheets. Members of the Board testified that at this meeting appellee insisted his bid was correct and that he could construct the building for the amount thereof, and that he understood ~~that~~ if he entered into a contract and failed to perform same he would forfeit his check. It appears that the check accompanying his original bill was not certified but that at this meeting he did leave with the Board a certified check which is the one in question. It does not seem that there was any formal letting of the contract at this meeting, but that everybody left with the understanding appellee should have the contract for the amount of his reformed bid \$59,998.00. The Board accepted

his certified check and the meeting ended with the understanding that the architect would prepare the contract in Chicago and forward it to Benton. It also appears from the evidence that on the following day one of the other bidders suggested to appellee that he had made a mistake in his bid and that he should recheck his figures. Appellee testified that he did so and discovered a mistake and on August 2 wrote to both the architect and the Board advising them of the mistake and enclosing with the letter his estimate sheets showing where the mistake had occurred. Appellee's correct bid, for which he claims to have submitted an amended proposition to the Board of Education, was \$100,870.00. The contract was later let to the next lowest bidder for the sum of \$103,990.00 with a provision protecting him against increase in price of labor and material. Appellants contend this provision cost them \$4,778.74 over the contract price. While there is some contradiction in this evidence, it clearly shows appellee made a serious mistake in computing his bid. We are also of the opinion that a preponderance of the evidence shows appellants knew that there was a mistake at the time of the meeting on July 26th and 30th. The architect was at such times convinced that there was a mistake in appellee's bid and that it was impossible for him to buy the necessary materials for the amount of his bid, and so advised the Board, insisting that the bid was wrong. Notwithstanding this fact the Board required from appellee and received his certified check and in effect advised him that his bid had been accepted.

Under these circumstances to hold that appellee should forfeit the amount of his check would in our opinion be repugnant to the principals of natural justice. The appellants place great reliance upon the case of *Stenmeyer vs Schroepel* 226 Ill. page 9. In that case however, it does not appear that the acceptor of the bid knew of the mistake made at the time of the acceptance. Neither was the mistake in that case of so serious a nature as the one in this case.

In our opinion the case of Bromagin vs City of Bloomington 234 Ill.114 is much more nearly parallel to the instant case than the Steinmeyer case. In that case it appears that the mistake in the bid was known to the engineer of the party to whom the bid was made, and he called attention of the board having charge of the matter to it, and that is one of the outstanding facts upon which the Supreme Court refused to declare a forfeiture of the check deposited with the bid.

The record presents a case calling for equitable relief and the decree which afforded that relief will be affirmed.

AFFIRMED.

not to be reported.

*Hon. George A. Crow Trial Judge
J. M. Webb - Webb & Webb - Appellant atty
messrs. Framer & Campbell - Appellees atty.*

245 I.A. 649 #2

Term No. 58

Agenda No. 63

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

OCTOBER TERM, A. D. 1923

DANIEL McLAUGHLIN,

Appellant,

vs.

STANDARD OIL COMPANY,

Appellee.

Appeal from

St. Clair.

May 20 1924

Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Opinion by HIGBEE, J.

On October 4, 1922, appellant filed his bill in the Circuit Court of St. Clair County, alleging that he and Mary Shea are the joint owners of the property located at 905-A Baugh Avenue in East St. Louis, Illinois; that said avenue runs east and west and is intersected by 9th street running north and south; that all the buildings located on each side of Baugh Avenue between 9th and 11th streets are used exclusively for residence purposes excepting one lot on the southeast corner of the intersection of 9th street and Baugh Avenue. The bill then sets forth an ordinance passed by the City Council on January 16, 1922, regulating and providing for the licensing of oil stations, and alleges that appellee is the owner of a lot situated on the northeast corner of the intersection of 9th street and Baugh Avenue; that appellee on the 27th day of September, 1922, presented to the Commissioner of Public Health and Safety, of the City of East St. Louis, a purported written consent of a majority of the property owners according to the frontage on both sides of Baugh Avenue between 9th and 11th streets purporting to give the consent of such property owners for appellee to erect and maintain a service station on its said premises; that together with such written consents there was submitted to said City Official a purported permit for the construction of such service station issued by the State Fire Marshal of Illinois, and that on the 28th of September, 1922, the Commissioner of Buildings of the City of East St. Louis, issued to appellant a permit to construct a one-story brick building on said premises at an estimated cost of \$3500.00 to be used for and occupied as an oil station; that upon consideration of said purported consent of the property owners and permit of the State Fire Marshal the Commissioners of the City of East St. Louis issued to appellee a license to establish and operate an oil station on its said premises for a term of one year, and that appellee is now constructing on its said premises the kind and character of building described in such building permit for the purpose of maintaining and operating an oil station.

The bill then alleges that neither the permit issued by the building commissioner nor the license issued by the Commissioners specified the nature, character or quantity of the oils to be handled and used on its premises by appellee, but avers

that it is the purpose and intention of appellee to place large tank reservoirs or containers underground, to store therein large quantities of gasoline to be sold for the operation of motor vehicles of all kinds, to cause said gasoline to be brought to its premises from time to time in motor vehicles containing large tanks and emptied into said reservoirs or containers and to provide and maintain in and about the buildings maintained on said premises various receptacles for different kinds of liquid oil; that said gasoline, oils and other materials to be kept and handled at said station are highly inflammable and explosive, and dangerous to the residents in said community; that said materials when so confined and used emit offensive odors; that the automobiles and other vehicles which would frequent said oil station would create loud noises both in the day and night time and interfere with the comfort and welfare of the people in that immediate vicinity, and that in the transferring of the gasoline and oils to said motor vehicles a portion thereof would become vapor and create a menace to those residing in proximity to said station, both because of the odor of the fumes and the inflammable character of the gasoline and oil; that appellee did not comply with the terms and conditions of said City ordinance in that it did not obtain the written consent of a majority of the property owners according to frontage on both sides of 9th street and Baugh avenue for the erection of such oil station, and that it did not make application in writing to the Commissioner of Public Health and Safety of East St. Louis as provided for by said ordinance and that for these reasons the permit issued by the Building Commissioner and the license issued by the Commissioners are null and void and do not constitute legal authority for appellee to construct and operate the proposed oil station on said premises; that on both sides of 9th street south of its intersection with Baugh Avenue and on both sides of Baugh Avenue west of its intersection with 9th Street the buildings are used exclusively for residence purposes, describing in detail the character of such residences and the grounds surrounding same.

The bill further alleges that the location and operation of such oil station would be obnoxious and hurtful to such buildings used for residences and to the occupants thereof in this, that many highpowered automobiles and other motor driven vehicles would constantly visit said oil station to provide appellee with materials to be sold and to purchase of appellee large quantities of such materials, and that said materials would constantly give off offensive odors and noxious gases; that said motor vehicles would constantly produce great noises which would necessarily interfere with the comfort and welfare of the residents in that vicinity, and that the handling and transferring of said gasoline and oil would cause vapor and thereby create a menace on account of the fumes and their inflammable character, rendering the life and property of said owners and occupants of said residences unsafe and defective; that pursuant to such permission and license appellee was about to proceed to tear up the sidewalks surrounding its premises, to destroy some large shade trees, and to make large unsightly excavations on said premises for the purpose of the erection of its proposed building, and that if appellee is permitted to proceed with the construction and

operation of its oil station and the handling and sale of the gasoline and oil, the noises and discomfort produced thereby and the danger incurred thereby will greatly damage appellant's premises and interfere with his enjoyment thereof as a residence and he will be unable to lease his said premises to tenants for such sums as his property is worth, and that in that respect appellant will be irreparably damaged and has no adequate remedy at law.

The bill then prayed for an injunction restraining appellee from further attempt to construct and operate its oil station on said premises. Upon the filing of the bill a temporary injunction was issued, upon appellant filing a bond in the sum of One Thousand dollars. The bond was filed and the injunction issued. Appellee appeared and filed its answer to said bill together with a motion to dissolve the injunction. The case was referred to a special Master in Chancery who filed a report recommending that the relief prayed for be granted and later overruled objections to this report. It was ordered by the Court that appellee's objections stand as exceptions before the Court and after argument, the Court entered a decree sustaining such exceptions, dissolving the temporary injunction and directing that complainant's bill be dismissed without prejudice for want of equity. This appeal has been perfected by complainant below from that decree.

The first ground argued by appellant for the reversal of this decree is that appellee did not comply with the said ordinance of the City of East St. Louis before obtaining a license to construct and operate its oil station. It is urged that appellee did not comply with such ordinance in that it did not secure and present the written consent of a majority of the property owners according to frontage on both sides of the street in the block in which it was proposed to erect the station as required by the ordinance. The controversy in this respect specially concerns the consent of the property owners on Baugh Avenue. It appears from the evidence that the frontage on each side of this street is 417 feet or a total of 834 feet. The written consent of the property owners on this street as filed, covered a frontage of 485 feet. One signer, R. F. Valentine, however, owning a frontage of 52 feet, withdrew his consent, leaving without it a frontage on the written consent of only 433 feet. William J. Burroughs, Sr., was the owner of 58 feet frontage on this street. He was not a resident of East St. Louis and his son-in-law, G. W. Beaird, signed his name to the consent. It is over this signature that question is raised. No withdrawal of such signature was ever filed by Burroughs or Beaird. Burroughs was not present at the trial and did not testify in this matter, but he made an affidavit concerning the matter on the fourth day of October, 1922. It does not appear that this affidavit was ever presented to any of the City officials or to appellee. The record disclosed that on the hearing it was stipulated that if Burroughs were present his testimony would be the same as the affidavit and the affidavit was then admitted in evidence. It is conceded by both parties that if Burroughs' signature to the written consent was legal a majority of the frontage was represented by the consent, but that if it is illegal appellee failed to have consent from a majority of the property owners. Burroughs' affidavit states in substance that he is a resident of

Colorado and is the owner of a frontage of 58 feet on Baugh Avenue in East St. Louis, improved with a two story frame building occupied by his son-in-law, G. W. Beaird, and his family, and that the same has been so occupied for some time; that on or about September 23, 1922, he learned that Beaird had signed his name to the consent petition in question; that upon receiving such information he at once wrote to Beaird informing him that he, Beaird, had not been authorized to sign affiant's name and that affiant did not think favorably of the proposition and would not sign such consent petition. The affidavit further stated that Beaird did not have authority to sign affiant's name and was not at the time affiant's agent for such purpose and was not then nor has he since been authorized to sign affiant's name, and that affiant "has not and does not now approve or ratify the act" of Beaird in the fixing of affiant's name to said petition. This affidavit is dated October 4, 1922. The property owners' consent together with the plan of the building and the State Fire Marshal's approval thereof was filed with the City Officials September 21, 1922, the permit to build that plant was issued September 28, 1922, and the bill in this case was filed October 4, 1922. The record does not show that any application was made to appellee or any City official to have Burroughs' name withdrawn from this consent. It appears from the record that this affidavit was in possession of appellant or his attorney or Burroughs until it was presented at the hearing. The evidence further shows that for a number of years Beaird had looked after this and other property of his father-in-law, Burroughs, in East St. Louis, leasing the same, collecting rents, paying taxes thereon and controlling it in a general way. In short the evidence showed that Beaird was Burroughs' general agent for his property in East St. Louis including this property on Baugh avenue. The law is well settled that a general agent may sign such consent petition for his principal and that the authority of such agent need not be in writing. (*Tippets vs. Street Railway Co.* 153 Ill. 147; *McVey vs. Danville*, 188 Ill. 428; *Tuerer vs. People*, 211 Ill. 296 and *Cosley vs. Barnes*, 251 Ill. 460). In view of the proof that Beaird was Burroughs' general agent concerning this property, and that there had been no application for the withdrawal of Burroughs' name from the written consent, we are of the opinion that the consent filed by appellee with the City represented a majority of the property owners according to frontage on both sides of the street in the block in question.

The ordinance above referred to was passed but a short time before appellee made its application for permit to construct the station and provided, that no license for an oil station should be issued in any event until a permit therefor should be issued by the State Fire Marshal and attached to the application for such license, and that such application should be made in writing to the Commissioners of Public Health and Safety upon a form provided for that purpose setting forth the name and residence of the applicant, if an individual or firm, and if a corporation the full name and residence of each of its principal officers, and the location of the place where it was desired to establish and maintain such oil station. It is the contention of appellant that the license to erect the oil station was invalid because there was no permit

from the State Fire Marshal for that purpose and no written application had been made by appellee to the said Commissioner upon a form provided for that purpose. On September 21, 1922, the written consent of the property owners was filed together with the plans of the proposed building. On the back of these plans appeared the following endorsement, "Department of Trade and Commerce. Approved August 24, 1922. John C. Gambier, Fire Marshal, Springfield, Illinois." We are of the opinion the endorsement on the plans of the building is clear proof that the State Fire Marshal had issued his permit to appellee for the construction of the building in question, and it further appears from the proof that the building was being constructed in accordance with the specifications prescribed by the rules of the Division of Fire prevention of the State. It was also shown by the proof that at the time when appellee applied to the Commissioner of Public Health and Safety for a license no written blanks had as yet been provided by the city for the making of such applications, but the verbal application of appellee was received and approved by the commissioner, who directed the license to be issued. It is doubtful whether this alleged omission was an informality of which appellant could take advantage in any event, but if he could do so, it was in this case waived by the city which neglected to provide the proper blanks. The next and final ground urged by appellant for a reversal of this decree is that the evidence discloses that the establishment and maintenance of the oil station in the location in question would be a nuisance and result in great and irreparable injury to appellant. In answer to this contention appellee insists that under the condition of the proof in this case the trial court was justified in refusing to grant the relief prayed for, at least until appellant had established in an action at law that the oil station is or would be a nuisance.

At the time of the hearing the oil station had not been constructed. The evidence as to whether or not when constructed, it would be a nuisance to the health and comfort of the nearby residents, and whether or not it would decrease the market and rental value of the surrounding property and therefore amount to a nuisance, was voluminous and quite conflicting. On this question appellant introduced twenty-seven witnesses, some of whom testified as to the injurious effect the proposed construction would have upon the market and rental value of the property in the neighborhood and upon the rates of insurance. Others testified as to other alleged objectionable features of such oil station. Some of these witnesses resided in the immediate vicinity of the proposed station and others resided in the immediate vicinity of other similar oil stations in the City of East St. Louis. On the same question appellee introduced the testimony of twenty-one witnesses, some of whom testified that the establishment and operation of the station would not decrease the market or rental value of the adjoining property, and would not increase the insurance rates and that the operation of the plant would not be objectionable nor a menace to the comfort of the residents in the immediate vicinity thereof. Certain of these witnesses were business representatives of appellee. Others resided in the immediate vicinity of the proposed station and

still others resided in the immediate vicinity of other similar oil stations in the City of East St. Louis. It would be practically impossible to consider in detail within the reasonable scope of this opinion the testimony of these different witnesses. Taken as a whole the witnesses for each party appear to be of equal credibility. Under this condition of the proof, and since the station itself was not in operation, it cannot be said that the evidence clearly shows that the construction and operation of this oil station would be a nuisance and result in injury to the appellant. The extent to which a Court of equity has jurisdiction to restrain the erection or continuance of a nuisance has been often discussed by the Supreme Court of this State and that question seems now to be well settled. The rule as it now exists is clearly laid down in the case of *City of Pana vs. Washed Coal Co.*, 260 Ill. 111 in the following language: "The existence of a nuisance not having been established by an action at law before bringing this suit in chancery, under all the authorities the facts must be clearly established and the law be without question before an injunction will issue."

In the case of *Busekrus v. Consolidated Oil Refining Company*, 216 Ill. App. 657, this court had under consideration a case where the question whether the maintenance of the business of handling petroleum distillates and oil in large quantities near the residence of certain persons in the City of East St. Louis could be properly enjoined. Whether the operation of the refinery plant engaged in said business was or was not a nuisance was vigorously contested by the proof of the respective parties and we there held that the question whether the refinery was a nuisance should be submitted to a jury in a suit at law and a decree granting an injunction was reversed.

From a consideration of the facts shown by the record in this case and the law as stated in the cases above referred to, we are led to the conclusion that the decree of the Circuit Court dissolving the temporary injunction and dismissing the bill for want of equity, without prejudice was right and it is accordingly affirmed.

Decree Affirmed.

Not to be reported in full.

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Har J. T. Gillham - Trial Judge
Burton + Burton Appellant atty
Willis + Duham - Appellee atty

Term No. 48.

Agenda No. 5.

IN THE
APPELLATE COURT OF ILLINOIS,
Fourth District.

245 I.A. 649 #3

OCTOBER TERM, A.D. 1924.

CHARLES FISHER,
APPELLANT.

VS.

HAZEL FISHER,
APPELLEE.

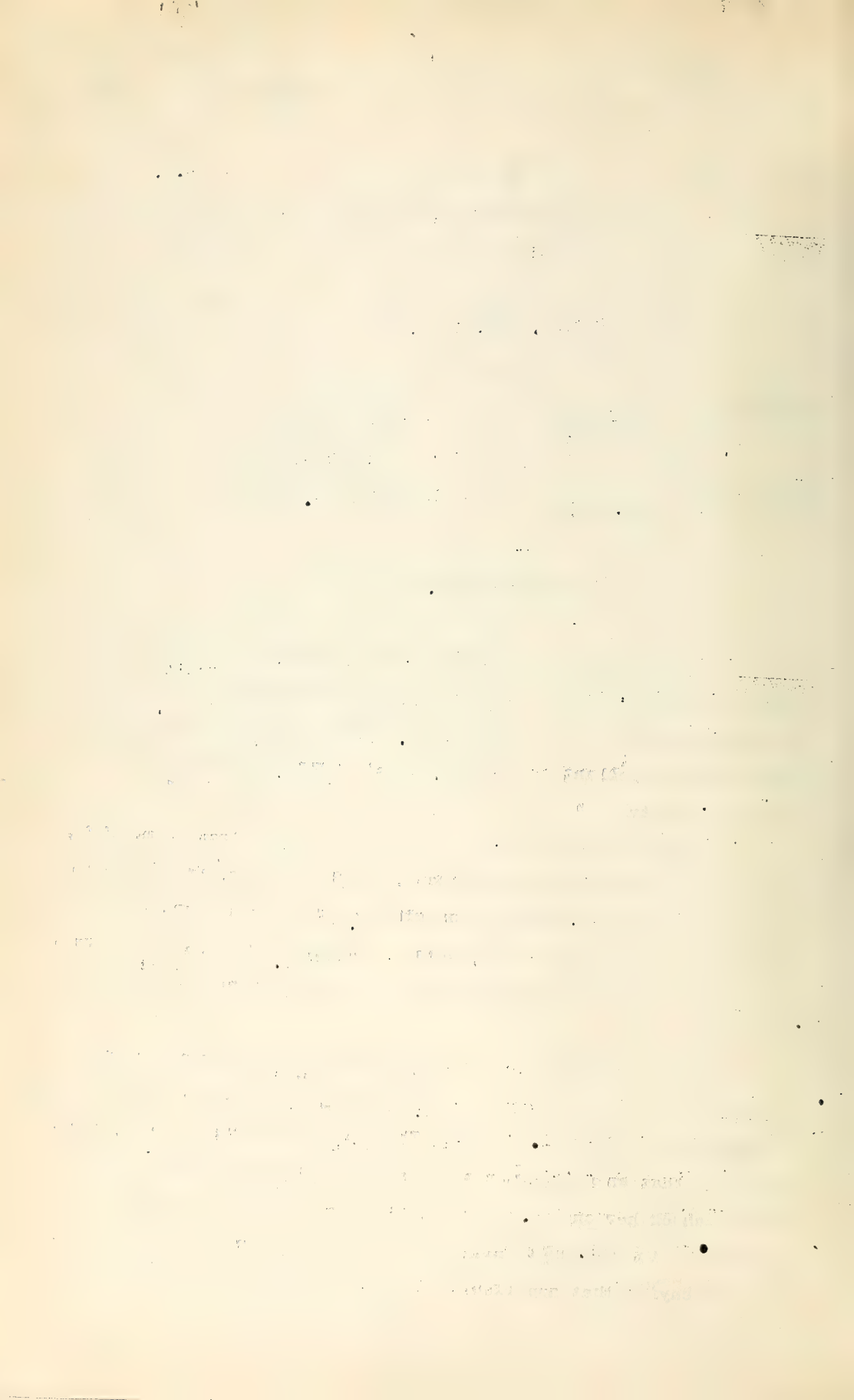
Appeal from the
Circuit Court of
Madison County.

OPINION by BOGGS, J.

This is an appeal from a decree rendered by the circuit court of Madison County, finding appellee not guilty of desertion, as charged against her in the original bill, and decreeing to her a divorce from appellant on her cross-bill, charging extreme and repeated cruelty.

This cause was before this court at its March Term, 1923, on an appeal prosecuted by appellant, Charles Fisher, from a decree dismissing his original bill, charging desertion, and decreeing a divorce to appellee on her cross-bill, charging cruelty. We reversed said decree on the ground that the same was not supported by the evidence.

Without going into a discussion of the evidence in this record, it is only necessary to say that ^{is} it substantially the same as the evidence on the former trial. The only difference of any consequence is that on the former trial appellee testified that her husband shook her on one occasion, at which appellant's father was present. On the former trial, both the appellant and his father testified, denying that appellant had shaken or mistreated appellee or



said occasion. On this trial, appellee testified that her husband had shaken her, and that the father rushed upstairs to their room, when appellant told him to take the baby, that is, the child of appellant and appellee, and that he would shake the life out of appellee. On cross-examination, appellee's attention was directed to her former testimony, and she was asked if she had answered to the effect that her husband's father was present on the occasion in question, and she stated: "I guess it was, I can't just remember what I said." So that, taking appellee's statement with reference to her former testimony in connection with this occurrence, we hold that the evidence is substantially the same in effect as it was on the former trial. We now hold as we did then, that the evidence in the record does not justify a decree of divorce in favor of appellee on her cross-bill on the charge of cruelty. That we said in our former opinion in this connection is referred to, and it is not necessary to restate it here.

It is next contended by appellant that the court erred in giving two of the instructions given on behalf of appellee, the first instruction complained of being as follows:

"The law requires that the complainant, to entitle him to a verdict, should establish his case as alleged in his original bill of complaint by a preponderance of the evidence, and if the jury find the testimony so contradictory or so evenly balanced that they are unable to arrive at a satisfactory conclusion as to the truth or falsity of the charges against the defendant in the original bill, then they should find the issues for the original defendant on the original bill."

This instruction directs a verdict, and in our judgment does not correctly state the law with reference to what the jury must find with reference to the weight of the evidence before appellant would be entitled to a decree. In other words, it is not

the law that the jury must arrive at a satisfactory conclusion as to the truth or falsity of the allegation of a bill or declaration before they can render a verdict in favor of the complainant or the plaintiff, as the case may be. All that they are required to do is to find that the allegations of the bill or declaration have been proven by a preponderance of the evidence.

It is also contended by appellant that appellee's instruction no. 3 should not have been given, not because it does not state a correct principle of law, but because it is contended that the evidence in the record does not tend to prove that appellant had been guilty of conduct which endangered the life or health of appellee, or which exposed her person to bodily hazard and intolerable hardship and rendered cohabitation unsafe. The instruction is abstract in form, and we are of the opinion, in view of the evidence in the record, that said instruction should not have been given.

We dislike to reverse a case where there have been two trials by jury, both the same result, and where the trial judges have affirmed the verdicts. However, as stated in the former case, as there is nothing in the record tending to show that appellee suffered any bodily injury on account of personal violence on the part of appellant, we feel compelled so to do. On the occasion in which appellee testified that he shook her, she did not undertake to say that it in any way injured her, and at the time she testified that he had choked her, she did not testify that this was done in anger, or that it in any way injured her. It is conceded that none of the acts of cruelty that she complains of were seen by anyone but herself, so there is no corroboration as to such alleged acts. Then, too, the record discloses that appellee lived with her husband from April until October, 1918, after the last alleged act of cruelty.

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That is meant by cruelty as used in our statute has been construed by our supreme court to mean physical acts of violence; bodily harm such as endangers life or limb; such acts as raise reasonable apprehension of bodily harm and show a state of personal danger incompatible with the marriage state. *Trenchard vs. Trenchard*, 245, Ill. 313. The cruelty to warrant a divorce must consist in acts of physical violence. *Maddox, V. Maddox*, 189, Ill. 152; *Compton, v. Compton*, 204, Ill. 629. The facts in this record do not bring appellee's case within the rule laid down in the foregoing authorities.

It is strenuously insisted by counsel for appellant that this case should be reversed with directions to the trial court to dismiss appellee's cross-bill and to grant appellant a divorce on his original bill. While we are of the opinion and hold that the evidence is not sufficient to warrant a decree in favor of appellee on her cross-bill, we are also of the opinion that the evidence is not of that conclusive character that would warrant us in directing a decree in favor of appellant non obstante verdicto, especially as the uncontradicted evidence shows that he was guilty of using profane and vulgar language toward his wife without any considerable provocation being shown.

For the reasons above set forth, the judgment and decree of the trial court will be reversed and the cause will be remanded.

REVERSED and REMANDED.

Not to be reported.

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TERM NO. 50 .

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AGENDA NO. 57.

STATE OF ILLINOIS.

APPELLATE COURT

FOURTH DISTRICT.

245 I.A. 649 #4

OCTOBER TERM A. D. 1924.

THE PEOPLE, ex. rel., & etc.)

Appellee.)

vs)

EDWIN S. FRITZ,)

Appellant.)

APPEAL FROM COUNTY COURT

OF

ST. CLAIR

COUNTY.

OPINION BY BARRY . J .

A former judgment against appellant was reversed and the cause remanded for a new trial, People vs Fritz, 228 App. 644. Appellant insists that the verdict is against the clear weight of the evidence. There is ample evidence to support the verdict. That on behalf of appellant is not of such a convincing character as to warrant us in saying that the conclusion of the jury is manifestly against the weight of the evidence. We find no reversible error in the admission or exclusion of evidence.

The State's Attorney, in argument, told the jury that if appellant was found guilty he might be required to pay as much as \$200.00 for the first year and not more than \$100.00 per year for the next nine years. An objection to the remark was overruled and appellant insists that the ruling is reversible error. Where the court gave instructions to the same effect they were held to be improper but not suf-

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ficient cause for reversal, People vs Waibel, 189 App. 30; People vs Campbell, 201 App. 215. In the case at bar the State's Attorney told the jury in the same connection that they had nothing to do with the amount appellant should pay, if guilty; that the only question for them to decide was whether he was the father of the child. It will be seen, therefore, that his entire remarks were not as objectionable as the instructions in the above cases cited. Finding no reversible error in the record the judgment is affirmed.

AFFIRMED.

not to be reported.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a legitimate political organization or a subversive group.

Journal of Management Education 30(6)

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Hon. W. F. Borders - Trial Judge
J. E. Grace - Appellant Atty.
J. B. Mc Glynn & Lester Gingsberg - Appellee Atty.
Term No. 14. Agenda No. 53.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT.

OCTOBER TERM A. D. 1924

FRANK KUSTER,
Appellant.

vs

W.A.HANKINS, CHARLEY BYERS,
SOUTHERN ILLINOIS NATIONAL
BANK and UNION TRUST COMPANY,
Successor to the SECURITY NATIONAL
BANK OF EAST ST. LOUIS,
Appellees.

Appeal from City Court
of
East St. Louis, Illinois.

OPINION BY BOGGS, J.

Appellant filed a bill in the city court of East St. Louis, charging among other things that on or about January 11th, 1924, appellant and appellee W.A. Hankins entered into a partnership for the purpose of conducting a hotel in East St. Louis; that pursuant thereto appellant purchased a certain stock of hotel furniture, fixtures, etc, and procured a lease on a building therefor, known as 301 East Broadway; that appellant expended in and about the purchase of said furniture, fixtures, etc, the sum of, to-wit: \$4,500.00; that appellee Hankins was to reimburse him for his half of said sum, and that they were to be equal partners in said business; that appellee Hankins took charge of the management of said business, carrying the funds derived therefrom in the Union Trust Company and the Southern Illinois National Bank of East St. Louis, in his own name, that at the time of filing said bill there was a large amount of such funds in appellee banks to the account of Hankins; that Hankins represented to appellant from time to time that said business was

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being operated at a financial loss, and agreed to furnish appellant with a statement of the financial condition of said business, but that he failed and neglected so to do; that upon investigation appellant ascertained that instead of losing money, said business was being operated at a financial profit; that the income therefrom was running from \$4,000.00 to \$6,000.00 per month, and that the operating expenses were only about \$1,800.00 per month; that appellee Hankins was insolvent and was squandering said partnership funds by gambling, and that said funds were in danger of being completely lost; that upon learning that appellee Hankins was squandering said funds and fraudulently converting the same to his own use, appellant demanded of him an immediate accounting, and that Hankins thereupon threatened appellant with bodily harm, exhibiting a revolver at the time; that a demand was made on appellant that he "agree to get out of said hotel and building, and renounce his interest in the said partnership business; that he was given a certified check for \$3,000.00 and was procured to sign a paper, the nature of which he did not understand, as he was unable to read and write." It is further alleged that appellee Hankins agreed to pay appellant the further sum of \$3,600.00, but had never done so; that appellant had never voluntarily parted with his interest in said business or in said property owned by said partnership; that appellee had placed a chattel mortgage on said hotel property to appellee ~~Yvers~~ for \$3,000.00, but charged that said mortgage was a sham and absolutely void as to appellant.

Said bill prayed that said copartnership be dissolved, that an accounting be had between appellant and appellee Hankins, that appellee Hankins be restrained from in any wise disposing of said hotel property and from expending the funds in appellee banks, and also prayed that appellee banks be restrained from paying over said funds, so on deposit in the name of appellee Hankins.

A temporary writ of injunction was issued on July 15th,

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1924. Thereafter, on the 19th day of July, a motion was made by appellant that a receiver be appointed to take charge of said business. The hearing on said motion was set for July 25th. On July 24th an answer was filed, and a motion in writing was made by appellee Hankins for the dissolution of said ^{temporary} injunction. Appellant insisted that he had had no notice of the making of said motion to dissolve said temporary injunction until just a few minutes before the time set for the hearing on the motion for the appointment of a receiver; that he was not ready to have the same heard, and asked to have the hearing on said motion to dissolve continued until a later date.

The court denied appellant's motion, and ^{set} said motion for hearing with the motion for the appointment of a receiver. Thereupon, appellant petitioned for a change of venue, which said petition was denied. A hearing was had in open court on the motion to dissolve said temporary injunction, and the court entered an order dissolving said temporary injunction and dismissing appellant's bill for want of equity. A suggestion of damages was filed by appellee, and the court, over the objection of appellant, at once entered upon the hearing of said matter, and upon the termination of said hearing entered an order assessing damages against appellant on the dissolution of said injunction, at \$400.00. To reverse said judgment and decree, this appeal is prosecuted.

The first ground urged by appellant for a reversal of said judgment is that the court erred in dismissing said bill for want of equity.

The law is that a court should not dismiss a bill for want of equity following the dissolution of a temporary injunction, unless an injunction is the only relief sought. Leonard, et al, vs. Arnold, et al, 244 Ill. 429; Nagy v. Bella, 303 Ill. 526; Brockway v. Rowley, 66 Ill. 99-102; Grimes v. Grimes, 143 Ill. 550. The law further is that in determining whether or not a bill should be dismissed following the dissolution of a temporary injunction, the

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motion to dissolve must be treated as a demurrer to the bill and the the case decided upon the face of the bill, as though no answer or replication had been filed. *Spiegler v. City of Chicago*, 216 Ill. 114-125.

The error assigned on the dismissal of appellant's bill for want of equity being one of the principal questions arising on this record, we have set out in substance the matters alleged there. Admitting as true the facts alleged as must be done on demurrer to the bill, appellant was clearly entitled to equitable relief, aside from an injunction. This being true, the court erred in dismissing said bill for want of equity.

The law further is that ~~an~~ motion to dissolve a temporary injunction, the court should not dismiss the bill for want of equity unless it not only fails to set forth ground for equitable relief, but cannot be made so to do by amendment. *Thomas v. Adams*, 30 Ill. 37; *Hummert v. Schwab*, 54 Ill. 142; *Brockway v. Rowley*, supra; *Goddard v. C. & N. W. R. Co.*, 202 Ill. 362; *Leonard, et al, v. Arnold*, et al, supra; *Nagy v. Bella*, supra. In *Leonard v. Arnold*, supra, the court at page 432 in discussing a question of this character, says:

"On a motion for a preliminary injunction, a bill in chancery will not be dismissed unless the injunction is the only relief sought. (*Hummert v. Schwab*, 54 Ill. 142; *Brockway v. Rowley*, 66id. 99.) The equity of a bill can only be questioned on demurrer or on the hearing. (*Brillv. Stiles*, 35 Ill. 305.) A motion to dismiss may be entertained upon the ground that there is no equity apparent on the face of the bill or that the court has no jurisdiction, and in such case the motion is treated as a general demurrer, admitting all the facts well pleaded by the bill. (*Vieley v. Thompson*, 44 Ill. 9; *Grimes v. Grimos*, 143 id. 550; *Canal Comrs. v. Village of East Peoria*, 179 id. 214.) It is only where it is manifest that no amendment can help it that a bill will be dismissed on such a motion. (*Thomas v. Adams*, 30 Ill. 37.) It is necessary, therefore to

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inquire whether the bill shows, on its face, that it is without equity."

It is next contended by appellant that the evidence in the record wholly fails to sustain said judgment for damages.

The only witness who testified on said hearing for damages was appellee Hankins, whose testimony was as follows:

"Q. You are the defendant in this case of Frank Kuster against W. A. Hankins and others?

"A. Yes.

"Q. Will you state to the Court what amounts of money you have expended, or made yourself liable for, because of this injunction?

"A. Something like \$200.00.

"Q. You have contracted for attorney's fees?

"A. Yes.

"Q. What other expenses have you?

"A. Different things; I borrowed some money.

"Q. Did you lay yourself liable for the payment of interest because of the borrowing of that money on account of your bank account being tied up?

"A. Yes.

"Q. How Much?

"A. I borrowed \$1,500.00 at 7 per cent interest.

"Q. For how long a time?

"A. Six Months.

"Q. That would be approximately \$52.50?

"A. Yes.

"Q. What amount of attorney's fees have you laid yourself liable for?

"A. Four hundred dollars."

The foregoing is all of the evidence offered or considered by the court on said hearing. This evidence, under

the authorities hereafter cited, is so palpably insufficient on which to base a judgment for damages, that we do not deem it necessary to discuss the same. *Jeyne & Amalini v. Osgood*, 67 Ill. 340-347; *Reynolds v. McMillan*, 209 Ill. 504; *Dempster v. Lansingh*, 234 Ill. 381-390; *Burroughs v. Merrifield*, 148 App. 594-603.

It is next contended by appellant that the court erred in dissolving the temporary injunction. We are of the opinion and hold that the temporary injunction should have been continued until a hearing of said cause on the merits.

On the question as to whether or not the court should have granted appellant further time on the motion to dissolve said temporary injunction, it might be observed that the statute provides for five days notice to be given prior to the hearing of such motions. *Cahill's Rev. Stat., chap. 69, sec. 14.*

For the reasons above set forth, the judgment and decree of the trial court will be reversed and the cause will be remanded.

Reversed and Remanded.

Not to be reported.

Hon. Wm. N. Butler Trial Judge
McEvans Appellant Atty
Haspenn Appellee Atty

TERM NC.72.

AGENDA NO.17.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT.

OCTOBER TERM A. D. 1924.

Robert B. Rice
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

A.O.MILLS,

Plaintiff in Error.

vs

CHARLES MATHIS,

Commissioner of Highways,
Road District No.11, Johnson
County, Illinois.

Defendant in Error.

Error to the Circuit Court
of
Johnson County.

245 I.A. 650#1

OPINION BY BOGGS, J.

Plaintiff in error, hereinafter called plaintiff,
filed a petition in the Circuit Court of Johnson County,
praying a writ of mandamus ordering defendant in error,
hereinafter called defendant, to remove certain obstructions
from an alleged public highway located in Road District No.
11 of said county.

Said petition avers among other things that "there
is a certain public road commencing at a point in the West
Section line of said Section 19, Township No.13 South, Range
No.4 East in Johnson County, Illinois, eighteen rods south of
the Northwest corner of the Southwest quarter of said Sect-
ion No.19, thence running east one half mile to the center

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line running north and south in said Section No.19, at a point eighteen rods south of the center point of said Section No.19, thence running north on said center line eighteen rods to an intersection with a public road known as the Vienna and Cantown road.....That at the ^{west} end of said first mentioned road on the section line running north and south between said Section No.24 and Section No.19, there is a public highway running north and south, and that the said first mentioned highway forms a connecting link between the two last mentioned highways;.....that the first mentioned public road is contiguous to, abuts upon and is adjacent to your petitioner's land,....and forms a direct outlet east from said land to, the said Vienna and Cantown road.That the said first mentioned public highway is a public highway by user having been in continuous use by the general public for travel, until the obstruction hereinafter described, for more than forty years, and for a great portion of said time has been inclosed with fences on the side, and of the width of about forty feet.....That on the 24th day of May, 1922, a Mr. John Hand presented a petition signed by a certain number of citizens praying that the said public road be vacated from the west end of same on the said section line between said Sections 24 and 19, eastward to the center line of said Section No.19, a distance of one half mile, to the Highway Commissioner, Charles Mathis, of said Road District No.11, and the said Highway Commissioner caused to be put up notices of a hearing on said petition on that day to determine upon the advisability of vacating said public road; that at the hearing of the said petition the said Commissioner of Highways Charles Mathis, declared that said road was vacated and entered a preliminary order to that effect;"

that notice of final hearing was given, and on final hearing an order was entered declaring said road vacated; that thereafter plaintiff perfected an appeal from said order to the Superintendent of Highways of said county, and that on a hearing before said Superintendent the order of said Highway Commissioner was reversed and held of no effect; that during the pendency of said proceedings Hand caused certain gates, one located at the west end, one at the east end and one at the halfway point in said road, to be securely locked; that plaintiff applied to remove or cause to be removed said gates, and that he had refused and neglected so to do; that by reason thereof said road is obstructed to public travel; prays writ of mandamus, etc.

To said petition an answer was filed by the defendant, denying among other things the existence of said alleged public highway, by user or otherwise, and denying that plaintiff is entitled to the relief prayed. A trial was had, resulting in a verdict finding that the alleged highway was not in fact a highway. A motion for new trial made by plaintiff was overruled. Thereupon plaintiff entered a motion for a judgment awarding the writ of mandamus, non obstante verdicto, which motion was overruled, and judgment was rendered against plaintiff, in bar of action and for costs. To reverse said judgment, this writ of error is prosecuted.

It is first contended by plaintiff for a reversal of said judgment that the verdict is against the manifest weight of the evidence. The record discloses that the road in question extends across the north half of the southwest quarter of Section 19, being eighteen rods south of the north line of said quarter section. It begins at what is known as the Township Road, which runs north and south along the west side of section 19, and extends in an easterly direct-

should result in lessening our ability to enter the
the only way to get into it is to go in and out of it.

ion to the east line of said quarter section, thence it turns north approximately eighteen rods and connects with the Vienna and Gantown road. The tract of land immediately north of the road in question is owned by one W.P. Walker, while the land lying immediately south of the road is owned by T.R. Hand. Some ten or twelve years before the filing of this petition, Hand erected three gates across said alleged highway, one at either end and one in the middle. The gates remained unlocked, and were opened and closed by users of the road, until some time in May 1922, when Hand locked said gates, as set forth in said petition.

The evidence on the part of plaintiff is to the effect that some forty years ago the owners of the premises in question fenced in a strip of ground running a half a mile east and west along the line above set forth, sixteen feet in width. It was not all fenced out at the same time, W.R. Walker, a witness for plaintiff, testified: "I left eight feet of the road, the other people left eight feet, I left the eight feet so that my neighbor, Willis Carleton, could get from his property. He wanted a road out from his farm." It is a serious question, on the evidence, as to whether it was ever intended by the owners of the land through which this road ran, to lay out or dedicate a road for the use of the public, or simply to leave a passageway for the neighbors who might care to use it. The evidence is to the effect that the road authorities never assumed control over said roadway, and never did any work on the same. The evidence, both on the part of plaintiff and defendant, is to the effect that for a good deal of the time said road was not passable for vehicles. A large number of the witnesses who testified on behalf of plaintiff had not been along said alleged roadway for ten or fifteen years. In fact, the evidence tends to show that for the last ten years prior to the filing

of the petition herein, practically no use had been made thereof, outside of such use as had been made by a few of the neighbors; that for ten years prior to the filing of said petition, there were fences across said alleged highway, gates being erected so that persons who desired to use the same could do so by opening the gates. We are therefore not prepared to say that the verdict of the jury is against the manifest weight of the evidence. It was for the jury, if properly instructed, to say whether or not said alleged highway was in fact a highway. High's Er. Leg. Rem., sec. 9; Crube vs Nichols, 56 Ill. 92; Illinois Watch Case Co., vs Pearson, et. al., 140 Ill. 432-434; B. & O.S.W.R.Co. vs Faith, 175 Ill. 58; Seidschlag vs Town of Antioch, 207 Ill. 280-283; C. & E.I.R.Co. vs People, 222 Ill. 376-412.

It is next contended by plaintiff that the court erred in giving the second, third, fourth and fifth instructions given on behalf of defendant in error.

While instructions 2 and 3 are in abstract form, they state correct principals of law and were applicable to the issues in the case, and the court did not err in giving the same.

In instructions 4 and 5, the court instructed the jury that if they found from the evidence that the alleged roadway had been abandoned, they should find the issues for the defendant. Counsel for plaintiff contends that there was no evidence in the record tending to prove that the alleged highway had ever been abandoned. Plaintiff, however, in his given instructions 8 and 13, submitted to the jury the issue as to whether said roadway had been abandoned. This being the state of the record, he is not in a position to complain of the giving of the defendant's fourth and fifth instructions, on the ground that the same brought into the

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1. [illegible]
2. [illegible]
3. [illegible]

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case the question of the abandonment of said alleged highway.

It is also contended that the court erred in giving defendant's fifth given instruction, which submitted to the jury the effect to be given the record of the proceedings had before the highway commissioner. Plaintiff is not in a position to urge this objection, for the reason that his fourteenth given instruction is subject to the same criticism.

Fifteen instructions were given on behalf of plaintiff, which in our judgment fully set forth plaintiff's theory of the case in all its phases, and for the reasons above stated we hold that the court did not commit reversible error in the giving of defendant's instructions 4 and 5.

It should further be observed that in this character of case it is incumbent upon the petitioner to establish a clear legal right to have the act prayed for performed, and by the respondent, before he is entitled to the writ of mandamus. *North vs Trustees of University of Illinois*, 137 Ill. 297; *People, ex. rel. vs McCullough*, 210 Ill. 488; *People vs Dunlap*, 248 Ill. 154. Under the evidence in this case, plaintiff has not established such clear legal right to the relief prayed as is contemplated under the authorities above cited.

Counsel for plaintiff treats the issues in this case as though Hand and Walker were parties to the suit, instead of the defendant, as Highway Commissioner. The Highway Commissioner is a public officer, and as such is not bound or estopped by the action of private parties.

It is contended by counsel for defendant that A.O. Hills, who attempted to appeal from the decision of the Highway Commissioner to the County Superintendent of High-

ways, was not an interested person as contemplated by the statute giving the right of appeal, and that therefore said County Superintendent of Highways was without jurisdiction to hear said appeal. In view of our holding on the merits of this case, it will not be necessary for us to discuss this proposition.

For the reasons above set forth, the judgment of the trial court will be affirmed.

JUDGMENT AFFIRMED.

not to be reported.

Hon. W. P. Green - Trial Judge
J. A. Granston, Appellants Atty.
H. H. House - Appellee Atty.

STATE OF ILLINOIS.

APPELLATE COURT

FOURTH DISTRICT.

Filed April 15, 1925

TERM NO. 7.

OCTOBER TERM A. D. 1925.

Agenda No. 5.

THE PEOPLE OF THE
STATE OF ILLINOIS

Defendant in Error,

VS.

MURRAY D. HORNBERGER, et al,
Plaintiffs in Error.

245 I.A. 650 #2
ERROR TO

COUNTY COURT OF

RANDOLPH COUNTY.

Opinion by Barry J.

The information under which plaintiffs in error were

convicted charged that, on March 3, 1923, in the county of Randolph,
"they did then and there wilfully and unlawfully possess and sell
intoxicating liquor, without being authorized so to do in the manner
provided in the Illinois Prohibition Act, contrary to the form of
the statute," etc.

One of the plaintiffs in error filed his affidavit in
support of the motion for a new trial in which he stated that
after a certain juror had been accepted to try the case, and
before any evidence was taken the jurors were excused for the
noon hour; that affiant then saw the said juror walk over to
where the State's Attorney and the former State's Attorney were
engaged in conversation, in the court room, and that the juror
said something to them; that the said juror immediately followed
the former State's Attorney to a point within ten feet of where
affiant was sitting and that the juror said something to the former
State's Attorney to which the latter replied: "they ought to be convicted."
Affiant then states that the former State's Attorney meant to
refer to the defendants, and that during the same noon hour he again
saw the said juror and the former State's Attorney engaged in a confidential
conversation in the office of the circuit clerk.

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The affidavit does not state that at the time in question the juror referred to, or any of the jurors, had been sworn to try the case, but simply that the person referred to had been accepted as a juror. So far as the record shows the jury may not have been secured at that time, and it does not appear from the abstract that the person referred to actually served as a juror in the trial of the case. Affiant does not claim that he heard any of the alleged conversation except the words above quoted, and he gives it as his conclusion that the former State's Attorney referred to the plaintiffs in error. It is not shown that the former State's Attorney was engaged in, or interested in the trial of this case, or that his alleged remarks referred to plaintiffs in error except as above stated.

Waiving the discrepancies in the affidavit, we are of the opinion the court did not err in refusing to grant a new trial because of the alleged improper conduct on the part of the former State's Attorney. It clearly appears from the affidavit that affiant was as fully informed of the alleged facts before any evidence was taken as he was after the verdict of guilty was rendered. If a party to a cause, which is on trial, is cognizant of an irregularity in the conduct of a juror or other person and does not avail himself of the first opportunity to bring it to the attention of the court, the right to make it the ground for a motion for new trial is waived. A party cannot in such case remain silent, take his chances of a favorable verdict and retain the right to bring it forward in support of a motion for new trial if the verdict is against him, *Stempofski, vs. Steffens* 79 Ill. 303; *Schlitz Brewing Co. vs. Compton*, 46 App.34.

Plaintiffs in error are in no position to question the ruling of the court on their motion to quash the indictment because the motion was made after they had entered a plea of not guilty and without obtaining leave to withdraw the plea, *People vs. Smith*, 317 Ill. 114. They filed a written motion in arrest of judgment but did not claim therein that the information was insufficient to charge a

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criminal offense. However, if an information charges no criminal offense the question may be raised on a writ of error even though there was no motion to quash or in arrest of judgment, *People vs. Wallave*, 316 Ill. 120. No argument is presented as to the alleged insufficiency of the information. We find nothing but a mere statement in the brief that the motion to quash should have been sustained and *People vs. Martin* 314 Ill. 110 and *People vs. Barnes* 314 Ill. 140, are cited in support thereof.

If it be conceded that the point was properly raised and argued, we are of the opinion that the information charged the commission of criminal offenses. The material averments are that plaintiffs in error possessed and sold intoxicating liquor, "without being authorized so to do in the manner provided by the Illinois Prohibition Act." In *People vs. Martin* 314 Ill. 110, at page 114 the court said:- "A person may violate section 3 by possessing intoxicating liquor without being authorized by law to possess the same, ~~XXXXX~~." The second count is not in the language of either section. It neither charges that plaintiff in error possessed intoxicating liquor without being authorized by law to possess the same, nor that he possessed intoxicating liquor with intent to violate the provisions of the Prohibition Act."

The court clearly indicated that such an averment as is found in the information in the case at bar is sufficient. The language used in the information is, in legal effect, the same as that of the court and it is quite evident that it was based thereon.

If the averment had been that plaintiffs in error possessed and sold intoxicating liquor, "without having a permit from the Attorney General" it, clearly, would have been sufficient, *People vs. Tate* 316 Ill. 52. We can see no material difference between that language and the averments in the information in the case at bar.

Plaintiffs in error do not point out any alleged error in the refusal of any of their instructions, nor do they argue that

there was error in that regard, but simply assert that they were entitled to instructions 2, 3, 4, and 5 which were offered by them and refused by the court. The alleged error in that regard was waived. However, we have examined all of the instructions given and refused. We find that 14 were given on behalf of plaintiff in error which fully covered every phase of the case and included so much of the refused instructions as the law would warrant and which was applicable to the issues.

The credibility of the witnesses and the weight to be given their testimony were questions for the jury. If the jury believed the witnesses offered on behalf of the People there is ample evidence in the record to support the verdict. Finding no reversible error in the record, the judgment is affirmed.

AFFIRMED.

Not to be reported.

W. F. Borders - Trial Judge.

Pape & Dreimyer Appellant atty
McHale & McHale Appellee atty.

Term No. 43.

Agenda No. 41.

In The

APPELLATE COURT OF ILLINOIS,

Fourth district.

MARCH TERM, A. D. 1925.

Filed Aug 5 1925

245 I.A. 650 #3

WILLIAM CONNOR, et al,
Appellees,

vs.

ROBERT E. WAHL, ET AL,
(ADAM EITZENHEFER,
ROBERT E. WAHL and
MYRA WAHL,)

Appellants.

Appeal from

City Court,

East St. Louis.

OPINION by BARRY, J.

Robert E. Wahl and Myra Wahl, his wife, on May 16, 1914, executed to Henry T. Renshaw, trustee, a mortgage to secure their note for \$1700.00 due in three years with interest at 6 per cent. About six months ^{later} Renshaw sold and assigned the said note and mortgage to appellant Eitzenhefer who has retained possession thereof from thence hitherto. No assignment was recorded and no notice thereof was given to the mortgagors who paid the interest to Renshaw until the maturity of the note and he paid the same to Eitzenhefer. After the note came due Renshaw continued to pay interest to Eitzenhefer until 1922 but no part of the principal has been paid.

When the loan came due the Wahls were not aware of the fact that Renshaw had sold the note and mortgage. They gave him a new note for \$1,700.00, secured by mortgage on the same premises solely for the purpose of a renewal of the first note and mortgage. Renshaw filed a release of the first mortgage. He did not use the new note and mortgage for the purpose for which they were delivered to him but, on Oct. 3, 1917, sold and delivered them to appellee Voightlander in whose hands they have been from thence hitherto. No assignment was recorded and no notice thereof was given the Wahls who paid the interest to Renshaw until May 16, 1922 and he paid the same to Voightlander but no part of

the principal has been paid. The money received by Renshaw ^{for} the note and mortgage was ⁿconverted to his own use.

On May 16, 1922 the Wahls assumed that their first note and mortgage had been fully paid by the second and that Renshaw held the second note and mortgage. They then executed to him a third note for \$1,700.00 secured by a mortgage on the same premises solely for the purpose of renewing the second note and mortgage but the same were never taken up or cancelled, although Renshaw, as trustee, released the mortgage of record. He did not use the third note and mortgage for the purpose for which they were delivered to him but on the contrary, on July 7, 1922, sold and assigned the same to appellees William and Nellie Connor, who filed the assignment of the mortgage for record. At the time they purchased the note and mortgage they relied on a certificate of title which showed that the prior mortgages had been released.

William and Nellie Connor filed a bill to foreclose the third mortgage. Appellant Eitzenhefer filed a cross-bill to foreclose the first mortgage. Appellee Voightlander filed an original bill to foreclose the second mortgage. The two suits were consolidated and issues joined. The wahls setup, inter alia, that the second note and mortgage were given for the purpose of taking up the first loan and that the third note and mortgage were given to take up the second note and mortgage and that neither was taken up or cancelled. The cause was referred to the Master to take evidence and report the same with his conclusions. He found the facts to be as above stated and recommended a decree for the foreclosure of the first mortgage; that the release thereof be set aside; that the Connor and the Voightlander bills be dismissed for want of equity. Objections to the Masters report were overruled and allowed to stand as exceptions. The Court found the third mortgage to be a first lien, the second mortgage to be a second lien and the first mortgage to be a third lien and ordered a sale and distribution of the proceeds upon that basis. Eitzenhefer and the Wahls appealed.

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It is strenuously insisted by appellees that the decree is in accordance with the law announced in Mann vs. Jummel, 183 Ill. 523; Williams v. Jackson, 107 U.S. 478; Bier vs. Weiler 203 Ill. App. 144 and similar cases. In some of the cases the only question involved was as to the priority of liens and in the others as to whether a subsequent purchaser or incumbrance without notice had a right to rely upon the facts disclosed by the record, at the time he purchased, or when he loaned his money. None of the cases hold that the assignee of a mortgage will be protected against equitable defenses of the mortgagor which existed at the time the mortgage was assigned.

In the case at bar all of the notes and mortgages were executed to the same mortgagee, Henry T. Renshaw, trustee. He knew when he took the second note and mortgage as a renewal of the first that the first had not been paid but was held by Witzzenhefer. Renshaw did not have the first note and mortgage at that time and had no authority to collect the same. When he released that mortgage and recorded the second he was not an innocent encumbrancer and parted with nothing. Voightlander did not loan the Wahls any money but bought the second note and mortgage from Renshaw several months after they were executed. Renshaw took the third note and mortgage as a renewal of the second knowing that he had sold the first and second and that they were held by Voightlander and Witzzenhefer. He did not have the second note and mortgage when he took the third as a renewal thereof and had no authority to collect the same. When he released the second and recorded the third he was not an innocent incumbrancer and parted with nothing. The Connors did not loan the Wahls any money but purchased the third note and mortgage from Renshaw several months after they were executed.

The contention of the Wahls in the trial court and here is that the second note and mortgage were given for the purpose of taking up the first and that the third note and mortgage were given to take up the second and that none of them were used by Renshaw for the pur-

U.S. Department of Justice

Washington, D.C. 20535

May 1, 1964

Dear Sir:

Reference is made to the letterhead memorandum dated May 1, 1964, captioned as above.

Re: [Name]

Enclosed for the Bureau are two copies of a letterhead memorandum dated May 1, 1964.

Very truly yours,

Special Agent in Charge

Enclosed for the Bureau are two copies of a letterhead memorandum dated May 1, 1964.

Very truly yours,

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Special Agent in Charge

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for which they were delivered to him. In other words they insist that there was a want or failure of consideration. If the Connors or Voightlander had loaned money to the Wahls on the faith of the releases executed by Renshaw and shown by the records without notice of the fact that the prior mortgage, or mortgages had not been paid, a different question would be presented.

The doctrine of an innocent purchaser for value, which applies to commercial paper, has no application to a mortgage. The assignee of a mortgage knows it is not assignable at common law but only in equity and that he takes it subject to all existing equities in favor of the mortgagor, *King vs. Harpster*, 306 Ill. 202-209, as against the assignee the mortgagor may show that there was a want or failure of consideration for the mortgage, *Pittsburg Plate Glass Co. vs. Kransz*, 291 Ill. 84-90.

It clearly appears that the Wahls received no consideration for the second or third mortgages. If Renshaw were now seeking to foreclose those mortgages the Wahls would have a full and complete defense. The assignees Voightlander and the Connors stand in no better position. That was our holding in *Kratzmeyer vs. Weissman* decided at the Oct. Term 1924 but not yet reported. In that case the Supreme Court denied a writ of certiorari and thereby approved our conclusions, *Soden vs. Claney*, 269 Ill. 98. The holders of the second and third notes may be entitled to recover in an action at law, *Zollman vs. Jackson Savings Bank*, 238 Ill. 290, but we know of no law that would authorize them to foreclose under the facts and issues in this case. As the first note and mortgage were not in Renshaw's hands for collection, or otherwise and he was not the agent of Bitzenhefer the release of the first mortgage was without authority and void and should be set aside and the mortgage foreclosed. The decree is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

REVERSED AND REMANDED.

Not to be reported.

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San Louis Bernreuter Trust
H. Bandy - Appellants Atty.
C. Williamson Appellants Atty.

Term No. 51.

Agenda No. 38.

In The

APPELLATE COURT OF ILLINOIS,

Fourth District.

MARCH TERM, A. D. 1925.

T. T. HINDE,

vs.

D. LAZAROFF,

Appellee,

Appellant.

Appeal from

Circuit Court,

Madison County.

OPINION by BOGGS, J.

In the year 1917, appellant, being engaged in the grocery and saloon business in Madison, Illinois, had in his possession a quantity of whiskey upon which he failed to pay a floor tax required to be paid under the United States revenue law then in effect, and a penalty was assessed against and collected from him of \$4,438.18. Appellant was in Florida, and did not return until after the time had elapsed in which the tax should have been paid, and for that reason the penalty was imposed. Thereafter, in April, 1918, appellant consulted with appellee, looking toward the recovery back of the amount of said penalty. Appellee was then associated with one Taylor R. Young in the practice of law in St. Louis, Missouri. Following said consultation, on April 29th, 1918, the following proposition was made through Taylor R. Young to appellant, which was accepted by him, to-wit:

"St. Louis, Mo., April 29th, 1918.

"Mr. Dimitro Lazarus,

Madison, Illinois.

"Dear Sir:

I hereby propose and agree to represent and prosecute your claim for return of tax or penalty assessed against and paid by you at the instance of the Revenue Department United States Government at East St. Louis, Illinois, in the sum of approximately \$4,441.84, and receive as my compensation in full for such services

a sum equal to one-half of the amount recovered or paid, if any, by said Revenue Department or the department of the Government whose duty it would be to pay or return said money if any is returned or paid; you to furnish to me affidavits to be used on any hearing that may be had in the matter, I am to bear all other expenses, including the fees and charges of all persons assisting me at Washington or elsewhere; in other words you are to be at no expense in the matter further than to furnish the affidavits and proof mentioned. If I recover no part of said sum for you I am to receive no compensation whatever for my services or expense.

Yours very truly,

Taylor R. Young.

"I accept the above offer and authorize you to proceed with the claim.

Dimitro Lazaroff".

Thereafter, in the year 1921, the Treasury Department decided that the penalty in question had been erroneously collected from appellant, and in August of that year the Comptroller General issued to appellant a treasury warrant for \$4,438.18 as a refund on the penalty collected. Upon settlement being made with appellant by the government, appellee demanded of appellant that he pay to him for his attorney's fees one-half of the amount so refunded. This appellant refused to do. Thereupon appellee instituted suit in the Circuit Court of Madison County against appellant to recover therefore. Two trials were had, both resulting in verdicts in favor of appellant. Both of said verdicts were set aside, and on the third trial a verdict was returned in favor of appellee for \$2,588.92, being one-half of the amount repaid to appellant, with interest thereon, on which verdict judgment was rendered. To reverse said judgment, this appeal is prosecuted.

The declaration as finally amended consisted of one special count and the common counts. In said special count appellee set out the

above-mentioned agreement and the assignment thereof by Taylor R. Young to appellee, and averred that appellee had performed the matters and things therein set forth to be performed by him, and that there had been recovered from the government the amount above mentioned, and that he, appellee, was entitled to recover from appellant one-half thereof, as set forth in said agreement. To said declaration appellant filed a plea of the general issue, supported by an affidavit of merits. A trial was had, resulting in a verdict and judgment as above set forth.

It is first contended by appellant for a reversal of said judgment that the verdict of the jury is against the manifest weight of the evidence.

The evidence on the part of appellee is to the effect that appellant had consulted with him in April, 1918, in his office in St. Louis, with reference to recovering back the amount of the penalty above mentioned; that he, appellee, had had some misunderstanding with the revenue department at East St. Louis, and for that reason thought it best to have the contract made in the name of his partner, Taylor R. Young; that upon the execution of said contract of employment, he took up with a Mr. Meeker the matter of looking after said claim in Washington; that Meeker continued in such employment until his death on November 3rd, 1918; that after the death of Meeker, Mrs. Meeker, his widow, who was residing at Washington, wanted to undertake the prosecution of said claim, and she was allowed to do so. Some time thereafter, the Revenue Department notified appellant that his claim for refund was disallowed in its entirety. Mrs. Meeker attempted to reopen the case, but was unsuccessful in her attempt. Appellee thereupon employed Warwick M. Hough, who had offices in St. Louis and in Washington, and who practiced in the Claim Department at Washington, and also Cook and Beneman, attorneys, of Washington, who were associated with Hough. Appellee further testified that he prepared a

complete transcript of all the proceedings that had been had up to the time of employing said attorneys, and of all the correspondence, for their use in the prosecution of said claim; that said attorneys were successful in having the case opened up, and were also successful in having the Department at Washington allow said claim and make a refund of said penalty. The testimony of appellee was corroborated by the testimony of Taylor R. Young, and George R. Beneman, of the firm of Cook and Beneman, and by the correspondence in connection with said transaction, which was offered and admitted in evidence.

On the other hand, appellant admits the making of said agreement, but insists that the same was made with Taylor R. Young, and he testified that in the latter part of 1918 Taylor R. Young, Mrs. Meeker and appellee were in consultation together, and that Young wanted appellant to advance \$100.00 to cover the expenses of Mrs. Meeker for a trip to Washington to look after said claim; that he, appellant, spoke up and said that under his contract he was not responsible for any expenses, and that Young then said: "Mr. Lazaroff, now is the time to get your money. If you don't feel like putting \$100.00 to get \$4,000.00, why should we put any, because we have no money there." He further testified that he said, "I pay enough, and I not pay any more. If you don't want to take care of the case, let me have agreement and we will forget." That Young replied, "Just as well, we will not go there any more if you don't want to put up \$100.00 expense for Mes. Meeker to go to Washington." Appellant then said, "All right, if you think you are through with the case, very well, I could find another lawyer to take care of my case." and Young then said, "All right." Appellant further testified: "I left there and got another lawyer, Mr. Stone at Springfield. I also employed Mr. Garesche of Madison. I never heard any more from Mr. Young until we came to this trial." Appellant further testified that he thereafter entered into a contract with Garesche in and by which he was to pay him one-third of the amount that he should recover.

In rebuttal, Young testified that, in the conversation referred to by appellant, he suggested to appellee that he furnish \$50.00 to cover Mrs. Meeker's expenses to Washington; that appellee spoke up and said that under the contract appellant was not to furnish any funds for expenses, and that thereupon he, Young, drew the check of the firm to pay her expenses. Appellee testified to the same effect with reference to this transaction. Young and appellee both testified that there was no abandonment of the undertaking to collect appellant's claim, and the evidence in the record fully sustains their contention. The record discloses that, from the time of the making of said agreement, appellee and Young, with the attorneys in their employ, were continuously at work on said claim.

It will be observed that whereas appellant testified that Young abandoned said contract in the latter part of the year 1918, the agreement entered into between appellant and Garesche was dated May 2nd, 1921, being only a few months prior to the settlement by the government with appellant. Garesche was sworn and testified on behalf of appellee that while he entered into a contract with appellant for the recovery of said penalty, that after he ascertained that there were other attorneys working on the claim, and the work that had been done by appellee and the attorneys associated with him, he did not try to hold appellant on said contract. We therefore hold that the evidence in the record fully sustains the verdict of the jury.

It is next contended by appellant that the contract entered into between him and Taylor R. Young, and which contract was assigned to appellee, was a champertous contract, and that its enforcement is against public policy.

This question was not raised by any plea filed by appellant, and was not mentioned in the affidavit of merits, which is somewhat lengthy, so the only way in which it was sought to be raised was by motion to direct a verdict, and motions for new trial and in arrest of judgment. It is held in Vol. 4, page 370, Encyc. Pl. & Pr., that in

order to raise a defense of champerty, it must be specially pleaded. So far as we have been able to ascertain, that question has never been raised in this state. Without reference, however, to whether the defense of champerty was properly raised, we are of the opinion that the contract in this case is not a champertous one, either at common law or under the holdings of the Supreme and Appellate Courts of this state. (Chitty on Contracts, 10th ed.p. 475; Blackstone's Com., vol. 4, p. 136; Park Comrs. v. Coleman, et al, 108 Ill. 591-601; Mills v. County of Franklin, 43 Ill. 267; Phillips v. South Park Comrs., et al, 119 Ill. 626-635; Brush v. City of Carbondale, 229 Ill. 152; Milk Dealers Bottle Exchange v. Shafer, 224 App. 415; v. Halsell, 161 U. S. 72-80.) In Park Commissioners v. Coleman, supra, the court in discussing a contract alleged to have been champertous, at page 601 says:

"So far as this record shows, these attorneys did not undertake to pay one cent of her costs or expenses in the maintenance of the suit, which is a complete answer to the claim the conveyance was a champertous contract. To make out a case of champerty it is not sufficient to show that a part of the thing recovered was paid or agreed to be paid as an attorney's fee. It must also be shown that the costs and expenses of the suit, or some part of them, are paid or agreed to be paid by the champertee. In Chitty on Contracts, (10th Am. ed.) page 745, the author defines champerty to be, 'A bargain with a plaintiff or defendant to divide the land or other matter sued for, between them, if they proceed at law, whereupon the champertee is to carry on the party's suit at his own expense.' It is clear from this definition, the case at bar does not come within its terms. This view of the law is fully sustained by Walsh et al. v. Shumway et al, 65 Ill. 471, and there is nothing in the cases cited by appellants laying down a contrary decision. (Gilbert et al v. Holmes, 64 Ill. 548; Thompson v. Reynolds, 73 id. 11; Coleman v. Billings, 89 id. 187.)"

A champertous contract contemplates that the champertee shall undertake to pay the whole or a part of the costs of litigation undertaken, for a part of the thing for which the litigation is brought. At common law it was ordinarily connected with a suit for land. In this case, there was no undertaking on the part of appellee to pay costs or expenses in connection with any contemplated litigation. In other words, there is nothing in the contract to indicate that litigation was intended, and evidently the only expenses contemplated to be borne by appellee was his own traveling expenses or the expenses of anyone who might be associated with him in the prosecution of said claim, and the only sum expended by appellee, so far as the evidence discloses, is the \$50.00 paid to cover Mrs. Meeker's expenses to Washington.

While champerty has not been abolished by statute in this state, the tendency of the decisions is to depart from the severity of the old law and at the same time to preserve the principle, "which tends to defeat the mischief to which the old law was directed, namely, the traffic of merchandising in quarrels, of huckstering in litigists' discord." (Milk Dealers Bottle Exchange v. Shafer, 224 App. 411, citing South Park Comrs. v. Coleman, 108 Ill. 591, and Phillips v. South Park Comrs., 119 Ill. 626.)

The record in this case wholly fails to show that appellee was attempting to stir up litigation. Appellant first called on appellee with reference to the recovery of the penalty paid by him to the government, and the contract entered into followed this interview.

It was also insisted by counsel for appellant, that appellee and the witness Taylor R. Young both testified substantially different in the last trial of said cause from what they testified to on the former trials, with reference to whether Young attempted to have appellant advance money to defray Mrs. Meeker's expenses to Washington, and with reference to whether there was an abandonment of the contract entered into by appellant with Young. Counsel argue

this matter at considerable length; however, there is nothing in the record to substantiate their contention, for the reason that the testimony given by appellee and Young on the former trials was not offered in evidence.

It is next insisted that the court erred in refusing to allow appellant to file a plea of no consideration. Apparently this application was made during the giving of evidence on the part of appellant. The case had been twice tried, and had been pending in the court for some while. We are therefore of the opinion and hold that the trial court did not abuse its discretion in refusing to allow such plea to be filed.

Counsel also assigned error on the refusal of leave to appellant to file a plea of set-off or recoupment during the trial of said cause. This assignment of error was not argued in appellant's brief and argument, and will therefore be taken as waived. (Keys v. Kimmel, 186 Ill. 109; Duffy v. Leavitt, 81 App. 410.) It might be further observed that the abstract filed by appellant does not set forth the application for such leave and the ruling of the court thereon, so appellant is not in a position to urge this assignment of error. The abstract filed with the record must be sufficient to present every error and exception relied on. (People v. Marshall, 309 Ill. 122-123, and cases there cited.)

Other errors were assigned on the record, but in our view of the case it will not be necessary to discuss the same. Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment Affirmed.

Not to be reported.

STATE OF ILLINOIS.
APPELLATE COURT.
4TH. DISTRICT.

MARCH TERM, A. D. 1927.

FILED
MAY 14 1927
RECEIVED
CLERK OF APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

245 I.A. 650 #5

TERM NO. 3.

AG. NO. 10.

MATHER PFEIFFENBERGER,
Plaintiff in Error,
VS.
ALBERT A. SUDRO, et al.,
Defendants in Error.

:
:
:
:
:
:
:
:
:
:
:

ERROR TO
ALTON CITY
COURT.

BARRY, P. J. - Plaintiff in error brought this suit on a promissory note dated February 11, 1921, for \$1,000.00 falling due one year after date with interest at five per cent. The general issue and two special pleas were pleaded and the trial resulted in a verdict and judgment in favor of defendants in error.

The first special plea is a plea of want of consideration. The second is to the effect that on February 11, 1921, defendant in error Lola May Sudro was afflicted with a tumor of the thyroid gland; that she consulted with plaintiff in error with reference to the removal of the said tumor; that an agreement was then and there entered into wherein it was agreed that in consideration of the note sued on plaintiff in error would remove said tumor and effect a permanent cure; that pursuant to said agreement plaintiff in error operated and claimed to have removed

STATE OF ILLINOIS
JUDICIAL DEPT.
ST. LOUIS

TO THE
CLERK OF THE COURT
ST. LOUIS

MARCH TERM, A. D. 1937.

2451 A. 650

AG. NO. 10.

AG. NO. 10.

ALBERT A. BROWN, JR.,
Plaintiff in Error.

ATTORNEY CITY

ALBERT A. BROWN, JR.,
Plaintiff in Error.

ALBERT A. BROWN, JR. - Plaintiff in error brought this suit on a promissory note dated February 11, 1931, for \$1,000.00 falling due one year after date with interest at five per cent. The General issue and two special pleas were pleaded and the trial resulted in a verdict and judgment in favor of defendants in error.

The first special plea is a plea of want of consideration. The second is to the effect that on February 11, 1931, defendant in error told May Gudio was afflicted with a tumor of the thyroid gland; that she consented with plaintiff in error to the removal of the said tumor; that an agreement was then and there entered into wherein it was agreed that in consideration of the note sued on plaintiff in error would remove said tumor and effect a permanent cure; that pursuant to said agreement plaintiff in error operated and claimed to have removed

the tumor, but that he so negligently and carelessly performed the operation that it became and was necessary in order to relieve the pain and suffering caused by his negligence, for defendants in error to employ another surgeon to perform another operation; that by means of the latter operation Lola May Sudro was relieved of the pain and suffering caused by the negligence and carelessness of plaintiff in error, etc.

When a physician undertakes the treatment of a case he does not guarantee a cure, nor is any promise to effect a cure or even a partial healing to be implied, nor does the law raise from the fact of employment an implied undertaking to cure, but only an undertaking to use ordinary skill and care. Of course a physician might contract specifically to cure and he would be liable on his contract for failure, but in the absence of such a special and peculiar contract, the fact that treatment has resulted unfavorably does not even raise a presumption of want of proper care, skill or diligence, 21 R.C.L. 391.

The record discloses that plaintiff in error performed a goitre operation upon Lola May Sudro on January 21, 1921. There is no evidence tending to show that prior to the operation there was any talk about a permanent cure or as to whether a second operation might become necessary. It appears that defendants in error fixed the doctor's fee for the operation without any suggestion from him. On February 11, 1921, three weeks after the operation, they wrote and delivered to the doctor the following note:- "In deep thankfulness to God for his goodness and in sincere gratitude to Dr. Pfeiffenberger for his kindness and for professional services rendered, we promise to pay the sum of \$1,000.00." While the note sued on bears the same date as the note above quoted

the fact, but that it is negligently and carelessly performed
the operation that it is proven that an unnecessary is made to
relieve the pain and suffering caused by the negligence,
defendants is not to allow another surgeon to perform another
operation; that by means of the latter operation Lois May Sapiro
was relieved of the pain and suffering caused by the negligence
and carelessness of plaintiff in error, etc.

When a physician undertakes the treatment of a
case he does not guarantee a cure, nor is any promise to effect
a cure or even a partial healing to be implied, nor does the
law raise from the fact of employment an implied undertaking to
cure, but only an obligation to use ordinary skill and care.
Of course a physician might contract specifically to cure and
he would be liable on his contract for failure, but in the
absence of such a special and specific contract, and that the
treatment was rendered with ordinary skill and care, and that the
operation at least of proper time, skill and diligence.

The record discloses that plaintiff's
father a police operation upon Lois May Sapiro on January 21, 1921.
There is no evidence tending to show that prior to the operation
there was any talk about a permanent cure or as to whether a
second operation might become necessary. It appears that defendants
in error claim the doctor's fee for the operation without any sugges-
tion from the doctor. On February 11, 1921, three weeks after the opera-
tion, the doctor and delivered to the doctor the following note:-
"It was understood in 1921 that the doctor was to receive \$1,000.00
for the operation. The doctor has not received the money and the
plaintiff, we promise to pay the sum of \$1,000.00."

ye ~~S. S. S.~~ says that the note sued on was not executed until
som ~~in~~ in May 1921. She admits that she told Dr. Merritt,
about four or five months after the operation, that she was
getting along nicely. Defendants in error, on January 1, 1922,
paid \$125.00 on the note. On April 9, 1922, they paid \$25.00
and on May 28, 1922, they paid \$25.00.

The operation was performed three weeks prior to
the date of the note and about four months prior to the time
the note was actually executed. There is no evidence tending
to support the first plea, that is, that the note was executed
without consideration. Defendants in error were allowed to
testify, over objection, that just before they executed the note
they asked the doctor if Mrs. Sudro was cured and if any other
operation would be required, and that upon his assurance that
she was cured and that no other operation would be necessary,
they signed the note. This is denied by plaintiff in error,
but even if it were true, the operation having been performed,
the alleged promise would be a nudum pactum Wilson vs. Blair,
27 A. L. R. 1235.

Defendants in error offered no evidence tending
to prove their second special plea. No one testified to any
careless or negligent act on the part of the doctor. A second
operation was performed on December 16, 1922, by Dr. Bartlett.
He says that the operation he performed was to correct a deformity
of Mrs. Sudro's neck which was the result of incisions made in
a former operation which failed to unite as they ordinarily do.
He says he simply removed scar tissue and by plastic work filled
out the contour of her neck and that the mental effect of being
treated apparently accelerated her improvement. He says he did
not remove any part of the thyroid gland and that Mrs. Sudro
was given reasonably skillful care by plaintiff in error in
the first operation.

[illegible][illegible]

Defendants in error offered no evidence tending to prove their second special plea. No one testified to any negligence or negligent act on the part of the doctor. A second operation was performed on December 18, 1932, by Dr. Bartlett. He says that the operation was performed with the same results as the first. Mrs. Sandoz's neck which was the result of incisions made in a certain operation with which she was not acquainted. He says he slightly improved her condition and she has been able to walk. He says the removal of her neck and that the mental effect of being treated apparently accelerated her improvement. He says he did not remove any part of the thyroid gland and that Mrs. Sandoz was never reasonably well by plaintiff in error in

We find no evidence in the record tending to support either of the special pleas. The verdict of the jury is more than likely due to sympathy and to the fact that the court permitted them to consider incompetent evidence under the guidance of erroneous instructions. Under the law and the evidence, as we view it, the court should have directed a verdict in favor of plaintiff in error for the balance due on the note. The judgment is reversed at the cost of defendants in error and judgment will be entered in this court for the sum of \$1110.00 and the costs in this court.

JUDGMENT REVERSED AND
JUDGMENT ENTERED HERE
FOR \$1110.00.

The clerk will incorporate
in the judgment the following:-
"The court finds that defendants
in error failed to prove any de-
fense to the note sued on and that
the amount now due upon said note
is \$1110.00.

Not to be reported

[illegible]

The clerk will incorporate
 the above in the
 minutes and find that defendant
 in error failed to give any de-
 tail to the note and that
 the amount was upon said note

5976

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
MARCH TERM, A. D. 1927.

FILED
MAR 11 1927
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

245 I.A. 651#1

TERM NO. 6.

AGENDA NO. 39.

PAUL CHOCOLAS,
Defendant in Error,

VS.

JULIA HARCHANY, ET AL,
Plaintiffs in Error,

:
:
: ERROR TO THE CIRCUIT COURT
:
: OF MADISON COUNTY.
:

BARRY, P. J. --- Defendant in error charged in his declaration that plaintiffs in error were conducting a soft drink parlor in Madison, Illinois; that on September 26, 1924, some of their patrons became loud and boisterous and that plaintiff in error Tony Harchany, attempted to eject them; that he secured a ball bat and that the other plaintiff in error secured a revolver and that together they were engaged in routing the said patrons and that while so engaged Julia Harchany, wilfully, wantonly and negligently and without regard to the safety of the public, discharged the revolver and shot and wounded defendant in error, who was lying on a bed in a house directly across the street. The trial resulted in a verdict and judgment for \$2500.00.

The principal testimony in the case on behalf of defendant in error is that of two boys, Maynard Ritchie and James Ward who were sixteen years of age at the time in question. Ritchie testified that he was playing a slot-machine and buying drinks

with the money that he won; that he hit off \$5.00; that the smallest Harchany boy claimed he was playing slugs; that plaintiff in error, Tony Harchany, wanted the boys to buy him a drink, but they would not give him any and he got mad; that he got a ball bat from behind the ice-box and started to chase the boys away and one of the boys grabbed a beer bottle and hit him on his wooden leg. Ritchie further testified that they got outside of the door and Mrs. Harchany ran in back of the counter; that under the cash register she opened a drawer and got a gun; that the boys ran down the street and went about fifty feet when three or four shots were fired; that they were fired from the side door, facing 10th street; that they looked back and saw the flash of the gun in the dark. On cross examination he testified; "we left the building when the first shot was fired. We were in the door when the first shot was fired. I seen Mrs. Harchany come out of the door with the revolver." James Ward testified that he went out the door when he saw Mrs. Harchany run back of the bar; that he ran about fifty feet, down as far as the alley; that he was right by the alley when the shooting started; that he was not able to see who fired them; that from the flashes it looked like the shots were going north; that he was running east.

Plaintiffs in error are husband and wife. They and their son Steven testified that on the night in question Julia Harchany had no gun in her hands at any time. She says she never had a gun in her hands and did not own one. She says she did not fire any gun and her husband testified that between nine and ten o'clock of the same evening, which was an hour or two later than the alleged occurrence testified to by the boys, that he heard two or three shots fired by some one outside of their place of business; that neither he nor his wife did the shooting.

any other person who was present at the time.

Witness

gives his own and he has said that he got a call

the morning and started to check the boys out

boys grabbed a few dollars and his wife on his way

further testified that they got outside of the door

then in back of the counter; that when the cash

and a gun

they were fired from the side door, facing both ways

back and saw the flash of the gun in the dark. Of

he testified; we left the building when the firing

tried. We were in the door when the first shot was fired.

that he went out the door when he saw Mrs. Hester

of the bank that he ran about fifty feet, down as far as

that he was right by the alley when the shooting started;

was not able to see who fired them; that from the flashes

like the shots were going north; that he was running east

at fifty in error are husband and wife. They

son Brown testified that on the night in question this

had no gun. Her hands at any time. He says she never

gun in her hands and did not see her. She says she did not

any gun and her husband testified

of the same evening when

occurrence testified to by

three shots fired by some one outside of their line of business

neither he nor his wife did the shooting.

It will be observed, therefore, that there was a conflict in the evidence as to the material facts. The court, at the request of defendant in error, instructed the jury as follows: "You are further instructed that if you believe from a preponderance of the evidence that the other defendant Antony Harchany aided, commanded, advised, countenanced or approved of the act of Julia Harchany in so firing said bullet, if done for his or their benefit, he is liable in the same manner as if he had done the same act with his own hands."

The giving of this instruction was serious reversible error. It clearly assumed that Julia Harchany fired the shot which injured defendant in error. That was a vital issue in the case upon which the evidence was conflicting. The evidence fails to show that Tony Harchany was an accessory before the fact. For that reason the court erred in submitting that question to the jury, *Alexander vs. Town of Mt. Sterling*, 71 Ill. 366; *I. & St. L. R. R. Co., vs. Miller*, 71 Ill. 463. The court should not have informed the jury that if they believed from the evidence that Tony Harchany countenanced or approved the act of his wife he would be liable in the same manner as if he had done the act, *Crosby vs. People*, 189 Ill. 298; *People vs. Powers*, 293 Ill. 600. For the reasons aforesaid, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported.

STATE OF ILLINOIS.

APPELLATE COURT.

4TH. DISTRICT.

MARCH TERM, A. D. 1927.

TERM NO. 15.

AG. NO. 13.

| | | |
|----------------|---|----------------|
| J. W. DAVIS, | : | |
| Appellant, | : | APPEAL FROM |
| | : | |
| VS. | : | SALINE |
| | : | |
| D. R. GASKINS, | : | CIRCUIT COURT. |
| Appellee, | : | |

BARRY, P. J. - Appellant is an insurance agent, and appellee a physician, and they were both living in Harrisburg at the time in question. Appellant procured a judgment by confession and the same was opened and appellee given leave to plead. He filed the general issue and a special plea in which he averred that the note was secured by fraud and circumvention; that in consideration of the execution of the said note appellant agreed that appellee would never have to pay it otherwise than by the rendition of medical services in examining applicants for insurance, which applicants would be furnished by appellant; that unless appellant furnished applicants for such medical examinations nothing would be due upon said note; that he did not furnish applicants for examination and has refused to do so, etc. Issues were joined and on the trial, without a jury, the court found the issues in favor of appellee and rendered judgment against appellant for costs.

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THESE RESULTS

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1. *Journal of the American Medical Association*, 1997; 277: 1039-1043.

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1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

... of the trial, without a jury, the court found the issues
... and has refused to do so, etc. Issues were joined
... that he did not furnish applicants for
... furnish applicants for such medical examinations nothing would
... would be furnished to applicants; that unless applicants
... is receiving applicants for treatment, which
... is paid to him for his services as
... of the execution of the will and applicant's interest in the
... was caused by fraud and circumvention. That in consideration
... general issue and a special plea in which he averred that the will
... some was caused and executed from fraud in fact. He filed the
... in question. Applicant produced a number of witnesses and the
... a physician, and that the fact stated in paragraph 4 of the
... HART, J. J. - Applicant is an unmarried female, and applicant

By replying to the special plea appellant admitted its legal sufficiency as a defense and the only question is as to the truth of the facts alleged therein, *Chicago Great Western Ry. Co., vs. People*, 179 Ill. 441-446; *Raymer vs. Modern Brotherhood*, 157 App. 519. Appellant contends that the judgment should be reversed because there was no proof that the note was procured by fraud and circumvention. While that portion of the plea was not proven, yet the evidence fairly tends to support the remainder of the plea.

It is argued that the court should not have considered the evidence in regard to the oral agreement, previous to or contemporaneous with, the making of the note sued on; that such evidence was inadmissible to contradict or vary the terms of the note. By joining issue on the special plea which set out the parol agreement and by permitting appellee to prove that agreement, without objection, appellant has no ground for complaint in that regard. He waived all objections to such evidence, *Baker vs. Fawcett*, 69 App. 300. It is unnecessary, therefore, to decide whether such evidence was competent. Incompetent evidence, when not objected to, may be received and given such probative value as it naturally carries, *Ascher Bros. vs. Industrial Commission*, 311 Ill. 258.

Having voluntarily tried the case upon the theory that if such a parol agreement existed it would be a valid defense appellant is in substantially the same position as the appellant in *Straus vs. Citizens Bank*, 254 Ill. 185, where the court held, in a somewhat similar case, that the appellate court had properly applied the law to the facts.

It is finally argued that appellee put it out of his power to make any more examinations, by moving a long distance

By referring to the special plea appellant admitted
the legal sufficiency of a defense and the only question is as to
the truth of the facts alleged therein. Chicago Great Western
Ry. Co., vs. People, 178 Ill. 441-442; Rayner vs. Northern Pacific
Ry. Co., 178 Ill. 441-442. Appellant contends that the facts should
be proved because there was no proof that the note was procured
at time and circumstance. While that portion of the plea was
not proven, yet the evidence fairly tends to support the remainder
of the plea.

It is argued that the court should not have con-
sidered the evidence in regard to the oral agreement, previous to
the making of the note and on that
the evidence was inadmissible to contradict or vary the terms
of the note. By joining issue on the special plea which set
out the oral agreement and by permitting appellee to prove
that agreement, without objection, appellant has no ground for
complaint in that regard. He waived all objections to such
evidence. Baker vs. Foxcroft, 89 App. 300. It is unnecessary,
therefore, to decide whether such evidence was competent. In-
competent evidence, when not objected to, may be received and
given such probative value as it naturally carries, as when facts.
W. Industrial Commission, 211 Ill. 252.

Having voluntarily tried the case upon the theory
that it was a legal agreement entered into by the parties
before the note was made, it is not surprising that the appellate court
should hold, in a somewhat similar case, that the appellate court
had properly applied the law to the facts.

It is finally argued that appellee put it out of
his power to make any more examinations, by moving a long distance

from Harrisburg, and that by reason thereof appellant had a right to sue upon the note, even if he did not have such right before defendant moved. Appellant filed but one replication to the special plea and the fact that appellee had moved was not referred to therein. The special plea did not state the time within which appellant was to furnish the applicants for medical examination, but he testified, without objection, that such applicants were to be furnished within one year from the date of the original note and that the note sued on was a renewal thereof. In the state of the pleadings and the proof, we would not be warranted in holding that the court erred in finding the issues in favor of appellee.

Appellee insists that in the absence of propositions of law there is no question properly preserved for review in this court. That contention is not in accordance with the law, P. C. C. & St. L. Ry., vs. Chicago Ry., 300 Ill. 162.

Finding no reversible error the judgment is affirmed.

AFFIRMED.

the fact that the Government has not been able to secure the necessary funds to carry out its program. The Government has been unable to secure the necessary funds to carry out its program. The Government has been unable to secure the necessary funds to carry out its program.

100. The above information is being furnished to you for your information only. It is not to be used for any other purpose.

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STATE OF ILLINOIS.
APPELLATE COURT
4TH. DISTRICT.
MARCH TERM, A. D. 1927.

TERM NO. 18.

AG. NO. 37.

PEOPLE OF THE
STATE OF ILLINOIS,
Defendant in Error,

VS.

AUGUST DUCHOW,
Plaintiff in Error.

:
: ERROR TO
:
: COUNTY COURT OF
:
: FAYETTE COUNTY.
:
:

BARRY, P. J. - Plaintiff in error was charged in the second count of the indictment with the unlawful possession of intoxicating liquor. The charge in that count was that on the first day of July, 1925, at and within the county of Fayette, he did possess certain intoxicating liquor, without then and there having a lawful right, license or permit from the Attorney General of the State of Illinois, etc. The indictment contained other counts, but plaintiff in error was only found guilty under the said second count.

His main contention seems to be that the second count of the indictment does not charge the commission of a criminal offense. We think the said second count charges a violation of the third section of the Prohibition Act and it has been so held in *People vs. Martin*, 314 Ill. 110-114, and in *People vs. Castree*, 322 Ill. 471.

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It is argued that the court erred in modifying plaintiff in error's tenth instruction. The record discloses that no exception was taken to the ruling of the court in that regard. The question as to whether the court erred in modifying the said instruction is not properly preserved and cannot be considered. It is argued that the verdict is manifestly against the weight of the evidence; that there is no evidence that plaintiff in error had possession of the liquor in question; that there was no competent evidence that the liquor was intoxicating. It is admitted by plaintiff in error that the liquor was in his home but he claims that it was made and possessed by his wife. The record discloses that he knew that the liquor was in his home; that he drank some of it and gave some to other persons. There is no evidence tending to show that he made any objections to his wife making the liquor, to her selling it or possessing it in the home. One who knowingly permits his wife illegally to keep intoxicating liquors upon the property occupied as their common residence is liable for the penalties which the law inflicts on unlawful possession, State of Washington vs. Arrigoni, 27 A.L.R. 310; People vs. Sylisloo, 19 A. L. R. 133. It seems to be conceded by plaintiff in error that the liquor in question was wine. That being true it was not necessary to aver or prove the alcoholic content, People vs. Cioppi 322 Ill. 353; City of Kewanee vs. Puskar, 308 Ill. 167; 48 L. R. A. (N.S.) 305.

Finding no reversible error the judgment is affirmed.

AFFIRMED.

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STATE OF ILLINOIS.
APPELLATE COURT,
4TH. DISTRICT.

MARCH TERM, A. D. 1927.

245 I.A. 651 #4

TERM NO. 21.

AG. NO. 28.

LINCOLN BANGROFT,
Appellant.
VS.
H. O. LEWIS,
Appellee.

:
:
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APPEAL FROM
AT. SLAIR
CIRCUIT COURT.

BARRY, P. J. - Appellant sued to recover damages for the destruction of his car and for personal injuries alleged to have been occasioned by an automobile collision on April 11th, 1925. The general issue was filed and the trial resulted in a verdict and judgment in favor of appellee.

Route No. 11, runs East and West, and First street, in the village of Brownstown, runs North but does not extend South of said Route 11. Route 11 is a hard road sixteen (16) feet in width with a traffic stripe in the center thereof. On the day in question appellant was driving west on the hard road and appellee was driving south on First street. Appellant testified that appellee turned on to the hard road from a northwesterly direction and then proceeded easterly on the north side of the traffic stripe and that the collision occurred 44 feet east of the center of the intersection. In that regard he was corroborated by other witnesses.

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Appellee testified that at the time of the collision his car was going across the traffic stripe and that he had not yet turned east. There was a conflict in the testimony as to the point of the collision.

The seventh instruction given on behalf of appellee reads as follows:- "The jury are instructed that the law permits the plaintiff in the case to testify in his own behalf and the jury should not disregard his testimony simply because he is the plaintiff, but the jury have the right, in weighing the evidence, to determine how much credence is to be given it, and to take into consideration the fact that he is the plaintiff and interested in the result of the suit."

The rule is well settled that such an instruction should not be given where the plaintiff and the defendant are individuals. In the state of the proof in the case at bar the giving of this instruction was highly prejudicial as it had a tendency to lead the jury to believe that there was something about appellant's testimony that the court thought would be sufficient to authorize the jury to discredit it. The giving of this instruction was reversible error.

No other complaint is made as to the court's rulings on the instructions, but in view of the fact that the case may be tried again we deem it advisable to call attention to the third instruction given for appellee. It reads:- "The court instructs the jury that the statute of the State of Illinois, regulating traffic on the roads of this State at the time of the collision, provided as follows: - All vehicles traveling upon the public highways shall give right of way to other vehicles approaching highways from the right and shall have the right of way over those approaching from the left." While this instruction was approved in another case, yet in the state of the proof in the case at bar, we think it is calculated to mislead the jury.

appeals limited to the issue of the validity of the jury

being given the plaintiff's story and that the jury was

left to decide a conflict in the testimony as to the point of

the collision.

The court's instruction that the jury should

decide as follows: "The jury are instructed that the law prescribes

the standard in the case of liability in this case and that the

jury should and should not disregard the testimony of either party in the

liability, but the jury must find the facts, as presented by the evidence,

and determine the law applicable to the facts found by the jury.

It is emphasized that the fact that he is the plaintiff and interested

in the result of the case."

The rule is well settled that such an instruction

should not be given where the plaintiff and the defendant are

adversely affected. In the state of the proof in the case at bar the

giving of this instruction was not prejudicial as it had a

tendency to lead the jury to believe that there was something

about defendant's testimony that the court thought would be

material to authorize the jury to disregard it. The giving of

this instruction was reversible error.

No other complaint is made as to the court's in-

struction of the instruction, but in view of the fact that the jury

was told again to find the facts as presented by the evidence,

instruction given for appellee. It reads: "The court instructs

the jury that the statute of the State of Illinois, regulating

liability in the case of collisions between motor vehicles, provides

as follows: 'All collisions between motor vehicles shall be

governed by the following provisions: 'All collisions between motor

vehicles shall give rise to a presumption that the driver of the

vehicle from the right and shall have the right of way over

another, approaching from the left.' While this instruction

was given in another case, yet in the state of the proof in

the case at bar, as shown by the evidence, it was not prejudicial.

If the testimony on behalf of appellant is true the collision occurred 44 feet east of the center of the intersection. First street is 50 feet in width, so that, under the evidence for appellant the accident occurred 19 feet east of the east line of First street. If there were no conflict in the evidence as to the alleged fact that the collision occurred 44 feet east of the center of the intersection, then it would seem that the statute referred to in the instruction would have no bearing upon the issues in the case. But there being a conflict in the evidence the court should leave it to the jury to determine as a question of fact. A vehicle is approaching an intersection from the right, within the meaning of the statute and is entitled to the right of way when, on its left, on an intersecting street, another vehicle is approaching whose driver, in the exercise of due care, would or should see that unless he yields the right of way the vehicles may or will collide, Partridge vs. Eberstein, 225 App. 209.

Appellant contends that the verdict is against the weight of the evidence. As the case must be again tried, we do not deem it advisable to express an opinion with reference to that question. For the error in giving appellee's seventh instruction the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported

It is pointed out that the evidence is that the witness
 observed at that point of the scene at the investigation, that
 there is no need to state, as that, under the evidence the
 appellant the witness observed at that point of the scene as to
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 the alleged fact that the witness observed at that point of the
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 investigation the evidence is entitled to the evidence, the evidence.

Not to be repeated
 The evidence is the evidence

5978

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
MARCH TERM, A. D. 1927.

MAY 14 1927
CLERK OF THE COURT
DISTRICT OF ILLINOIS

245 I.A. 651 #5

TERM NO. 37.

AGENDA NO. 41.

FRANK SHAY, Administrator, etc., :
Appellee,

VS.

J. J. SEIBEL,

Appellant.

: APPEAL FROM THE CITY COURT
: OF EAST ST. LOUIS, ILLINOIS.
:

BARRY, P. J. Ridge Avenue runs east and west, and 26th street intersects it at right angles. Appellant lives at the southeast corner of the intersection, the house facing west. There is a garage just south and in the rear of his house with a driveway there to from 26th. street. Frank Shay lived in the third house south of appellant. On May 16, 1926, three of Mr. Shay's children and another child were playing on the sidewalk at or near the driveway to appellant's garage. Appellant had taken some of his family for a drive and upon their return he came from the west on Ridge Avenue turned south on 26th street and then east into his driveway. He saw the children on the sidewalk near the driveway but gave no signal or warning of his approach. The record discloses that none of the children saw or heard the car until it struck one of the children, Catherine Shay, a child five and a half years of age. The child was crushed and killed. It also appears that the deceased and her brother were facing south as the car approached and entered the driveway. The trial resulted in a verdict and judgment in favor of appellee for \$3,000.00.

Appellant contends that there was no evidence of negligence upon his part and that the court erred in refusing to direct a verdict. Contributory negligence cannot be attributed to the deceased because of her age. Under all of the circumstances we are not prepared to say that there was no negligence proven. If appellant had sounded his horn or given warning of the approach of his car the death of this child might have been avoided. The question as to the negligence of appellant was properly left to the jury.

Appellant argues that the court unduly restricted his right of cross examination and thereby prevented him from proving negligence on the part of the parents of the deceased. May Alice Shay was a witness on behalf of appellee and on cross examination she was asked:- "Did your mother and father ever tell you children to be careful?" The question was objected to and the witness answered "Yes". The court then sustained the objection. There was no motion to strike the answer and no further questions asked along that line. It was not proper cross examination and appellant has no ground for complaint in that regard.

It is argued that the court erred in giving to the jury an instruction on behalf of appellee. It is said that the instruction was erroneous because it did not require the jury to find that the parents of the deceased had exercised due care and caution for its safety. If there were any evidence in the case tending to show that either parent was guilty of any negligence that contributed to the death of the child the giving of this instruction would be reversible error. We find no evidence of contributory negligence on the part of the parents. The mother of the child was sitting on her porch a short distance from the place of the

accident and the child was playing with her brother and sister, both of whom were older than she, and another child. There was no evidence which would authorize the jury to find that there was contributory negligence on the part of the parents. It is also suggested that the instruction assumed that appellant was guilty of negligence. We cannot agree with that contention. The instruction required the jury to find that fact from the evidence. Finding no reversible error in the record, the judgment is affirmed.

AFFIRMED.

Not to be reported.

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STATE OF ILLINOIS.
APPELLATE COURT.
4TH. DISTRICT.
MARCH TERM, A. D. 1927.

FILED
1927
CLERK OF THE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 39.

AG. NO. 19.

245 I.A. 651^{#6}

| | | |
|-----------------------------|---|-----------------|
| EDWARD BILYEU, | : | |
| Appellee, | : | APPEAL FROM |
| | : | |
| VS. | : | CITY COURT OF |
| | : | |
| BALTIMORE AND OHIO R.R.CO., | : | EAST ST. LOUIS. |
| Appellant. | : | |

BARRY, P. J. - Appellee was employed by appellant as a member of an extra section gang of which John Higgins was foreman. On December 1, 1926, this gang was engaged in removing earth and short ties from appellant's track and putting in long ties to take the place of those removed. The work was being done about three miles east of Caseyville, at which point appellant had but a single line of railroad. The work that was being done was for the purpose of connecting a switch track from a coal mine with the main line of appellant's railroad.

On December 2, 1926, this section gang left Caseyville to return and take up the work upon which they had been engaged the day before. The members thereof were being transported on a motor car furnished by appellant and operated by its said foreman. Before reaching destination they met a freight train and the foreman told the men to jump. Appellee and others jumped

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IN THESE SPACES
BETWEEN LINES
YOUR NAME AND DATE~~

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| THE UNITED STATES | : | .IN |
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| SIXTY-THREE | : | ..U.S. DEPT OF JUSTICE |
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On December 2, 1933, this section gang left Jaxbyville to return and take up the work upon which they had been engaged the day before. The members thereof were being transported on a motor car train to Applegate and arrived at the station. Before reaching destination they met a freight train and the foreman told the men to jump. Applegate and others jumped and the gang was captured by Applegate as a result of which they were taken to the station and held in custody until the morning of December 3, 1933, when they were released to the Jaxbyville section gang of which they were members. The Jaxbyville section gang of which Applegate was a member at the time of the above mentioned events was composed of about 15 men and was engaged in the work of maintaining the track and putting in long ties to take the place of those removed. The work was being done about three miles west of Gageville, at which point Applegate had put a single line of railroad. The work that was being done was for the purpose of connecting a railroad line with the main line of Applegate's railroad.

and the motor car was demolished. Appellee was seriously injured, both bones of his left leg having been broken between the knee and the ankle. He sued appellant to recover damages under the Federal Employers Liability Act , and the trial resulted in a verdict and judgment for \$12,500.00..

Appellant concedes that at the time in question it was engaged in Interstate Commerce. It insists, however, that appellee was not so engaged. From a careful consideration of the evidence we are of the opinion that it was a question of fact for the jury as to whether or not appellee was engaged in Interstate Commerce at the time of his injury.

Some complaint is made in regard to the giving and refusing of instructions, but we are of the opinion that no reversible error was committed in that regard.

It is finally argued that the verdict was excessive. At the time of his injury appellee was 67 years of age and was earning \$3.16 a day. While he was severely injured, yet in view of his age and earning capacity we are of the opinion that a new trial should be awarded unless a remittitur of \$3500.00 is entered. If such a remittitur is entered with twenty days from the date of the filing of this opinion with the clerk of this court, the judgment will be affirmed for \$9,000.00, otherwise the judgment will be reversed and the cause remanded.

AFFIRMED UPON FILING
REMITTITUR, OTHERWISE
REVERSED AND REMANDED.

Not to be reported

and the other two were seriously injured, and the latter two were seriously injured. The injury to his left leg having been broken between the knee and the ankle. He sued appellee to recover damages under the Federal Workmen's Compensation Act, and the trial resulted in a verdict and judgment for \$12,000.00.

Appellee concedes that at the time in question it was engaged in interstate commerce. It insists, however, that appellee was not so engaged. From a careful consideration of the evidence we are of the opinion that it was a question of fact for the jury as to whether or not appellee was engaged in interstate commerce at the time of his injury.

Some complaint is made in regard to the giving and retelling of instructions, but we are of the opinion that no reversible error was committed in that regard.

It is finally argued that the verdict was excessive.

At the time of his injury appellee was 67 years of age and was earning \$12.14 a day. While he was severely injured, yet in view of

his age and earning capacity we are of the opinion that a new trial should be ordered unless a remittitur of \$2800.00 is entered. If

such a remittitur is entered with twenty days from the date of

the filing of this opinion with the clerk of the court, the judgment will

be affirmed for \$9,000.00, otherwise the judgment will

be reversed and the cause remanded.

APPROVED UPON FILING
REMITTITUR, OTHERWISE
REVERSED AND REMANDED.

FILED
JUL 11 1917
U.S. DISTRICT COURT
SOUTHERD DISTRICT OF CALIFORNIA

Handwritten signature

W. H. HARRIS

CLERK

U.S. DISTRICT COURT

1917

5980
STATE OF ILLINOIS.
APPELLATE COURT
4TH. DISTRICT.

MARCH TERM, A. D. 1927.

MAILED
MAR 14 1927
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 43.

AG. NO. 31.

245 I.A. 652^{#1}

| | | |
|-------------------|---|-----------------|
| FLOSSIE WILLIAMS, | : | |
| Appellee, | : | APPEAL FROM |
| | : | |
| VS. | : | CITY COURT OF |
| | : | |
| ANNA MARKS, | : | EAST ST. LOUIS. |
| Appellant. | : | |

. BARRY, P. J. - Appellee recovered a verdict and judgment of \$1500.00 for slander. The language alleged to have been used by appellant charged appellee with unchastity and was actionable per se. Appellee was a customer at the grocery store conducted by appellant and owed a bill in regard to the payment of which there was some delay and controversy. Appellant and her young daughter went to the home of appellee with reference to the payment of said bill, and while there it is alleged that the slanderous words were spoken. The persons present at that time were appellee, her husband and three small children, the brother of appellee and a young lady who was then engaged to be married to the said brother, and who married him soon after the said occurrence.

[Faint, illegible text]

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[illegible]

Appellant contends that the verdict is against the weight of the evidence. Four witnesses on behalf of appellee testified that appellant, on the occasion in question, spoke the slanderous words alleged in the declaration. Appellant and her daughter denied that the words were spoken. There was a conflict in the evidence and we would not be warranted in holding that the evidence on the part of appellee was insufficient to support the verdict.

Some complaint is made as to the court's rulings on instructions given for appellee. We have carefully considered the same and are of the opinion that there was no reversible error in such rulings. The words were actionable per se and it was not necessary to prove actual damages. It is quite apparent, however, that no actual damages were sustained. In view of the circumstances under which the language was used, and the relationship of the persons present, we are of the opinion that the verdict is excessive. If appellee will file a remittitur of \$1,000.00 within twenty days from the filing of this opinion with the clerk of this court, the judgment will be affirmed for \$500.00. In such case appellee will pay two-thirds (2/3) of the costs in this court and appellant the balance. If the remittitur is not filed the judgment will be reversed and the cause remanded at the costs of appellee.

AFFIRMED UPON REMITTITUR
OF \$1,000.00, OTHERWISE
REVERSED AND REMANDED.

Not to be reported

Appellant complains that the verdict is against the weight of the evidence. Four witnesses on behalf of appellee testified that appellant, on the occasion in question, spoke the words alleged in the declaration. Appellant and her counsel testified that the words were spoken. There was a conflict in the evidence and no weight can be attached to either side's evidence on the part of appellant was insufficient to support the verdict.

Some complaint is made as to the court's ruling on instructions given for appellee. We have carefully considered of the same and find no error. The words were actionable per se and it was not necessary to prove actual damages. It is quite apparent, however, that no actual damages were claimed. In view of the circumstances under which the damages were claimed, and the admission of the previous payment, we are of the opinion that the verdict is excessive. It appears that the plaintiff claimed \$12,000.00 within twenty days from the filing of the petition and the claim of this court, the judgment will be affirmed for \$100.00. In such case appellant will pay interest 10% of her claim in this court and appellant the balance. If the verdict is not affirmed the judgment will be reversed and the cause remanded to the court of appeals.

AFFIRMED UPON REMITTITUR
OF \$1,000.00, OTHERWISE
REVERSED AND REMANDED.

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2451A. 652^{#2}

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CLERK OF THE DISTRICT COURT
FOURTH DISTRICT OF ILLINOIS

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The declaration alleges that on September 22nd, 1924, appellee was riding in a wagon in an easterly direction upon and along Missouri avenue in the city of West St. Louis; that at the intersection of said avenue with Eighth street he was turning to the north, and while in the exercise of due care and caution for his own safety, an electric car

owned by appellant was so carelessly, negligently and improperly operated by appellant's motorman that the same collided with appellee's wagon and appellee was thrown to the pavement, receiving the injuries for which this suit is prosecuted. To said declaration a plea of the general issue was filed.

Missouri avenue is 80 feet in width between property lines, and from curb to curb is about 48 feet. In the center of said avenue, two street railway tracks belonging to appellant are laid, it being a little more than 14 feet from the north rail of the north track to the south rail of the south track. Eighth street is 36 feet wide between curbs. Ninth street is about 300 feet to the east of the east line of Eighth street, and crosses Missouri avenue at right angles.

The principal ground relied on for a reversal of said judgment is that appellee was not in the exercise of ordinary care for his own safety, just prior to and at the time of the accident in question.

The evidence on the part of appellee is to the effect that about 6:30 on the evening in question he was driving east along Missouri avenue with a team of mules hitched to a flat-bottom wagon used for hauling hay; that it was clear and he could see a distance of some two blocks to the east. Among other things, appellee testified:

"As I was nearing Eighth street I noticed the street car coming west on Missouri avenue. It was nearly to Ninth street. I was probably thirty or forty or fifty feet from Eighth street, probably that distance west of Eighth street, when I noticed the street car. I judge the car was about in the middle of the block between Eighth and Ninth street. When I was within thirty or forty feet of Eighth street the

car was just leaving Ninth street. I noticed a street car stopped at Ninth street. Did not notice if any passengers got off or on at Ninth street. When I was in Eighth street, the street car was about the center of the block between Eighth and Ninth. I continued making my turn. When I was making my turn and my team was about the center of the street at Eighth and Missouri the street car was somewhere north of the stop sign, not quite to it. This is a street car stop sign, located, I think forty or fifty feet, maybe seventy-five feet. I don't know the distance. I saw the street car when I made the turn. My team was on the north track when they were struck; about the center of Eighth street. The head one would be right on Missouri avenue when we turned. the right one would be right next to his car."

On cross examination he testified: "When I was within twenty feet of Eighth street the westbound car had just left Ninth street. Eighth street, I suppose, is fifty or pretty near sixty feet--I probably would have to travel forty-five feet to get to the center. Up to that time I had been traveling between the track and the curb, which is about eighteen feet wide. I was about twenty-five feet from the west line of Eighth street when the car was at Ninth street. I was traveling in an easterly direction between the south rail and the curb along Missouri avenue, and when I was about twenty-five feet, I turned and was traveling on Eighth street; when I got to the center of the north-bound track where the mules got struck." He further testified that the motorman was "standing with his back to me."

The testimony on the part of appellee and his witnesses is to the effect that appellant was operating its car at from 15 to 23 or 24 miles per hour just prior to and at the time of the accident, while the testimony on the part of

appellant's witnesses is to the effect that said car was being operated at from 10 to 15 miles per hour at said time. Appellee and certain of his witnesses testified that appellee's team was traveling in a walk just prior to said collision, while certain of appellant's witnesses say they were being driven in a trot.

One of the contested points in the case is as to whether appellee began to turn north before he got on Eighth street or afterward.

Frank Murd, a witness on behalf of appellee, testified that "the old man was almost past Eighth street when he started to make his turn." Louis Remmler, a witness for appellee, testified "when the wheels started to cross the track, they were in about the center of Eighth street, or about three or four feet to the right of the center." Helen Crozier, a witness for appellee, testified that she came up to the scene of the accident about five minutes after the collision, and that "about six or seven feet from the east curb of Eighth street and Missouri avenue, I noticed blood and hair all along the track." The testimony on the part of appellant's witnesses was to the effect that the collision took place some thirty to fifty feet west of the west line of Eighth street.

In Chicago City Railway Co. v. Sandberg, 123 Ill. 400, the court at page 402 says:

"Attempting to cross the track of a street railway ahead of a moving car is not necessarily to be imputed as contributory negligence. It may or it may not be prudent, depending upon the proximity of the car and the speed with which it is moving. Whether in the particular instance reasonable care was exercised in going on the track, is a question for the jury under proper instructions."

In Chicago City Railway Co. v. O'Donnell, 203 Ill. 267, the court at page 272 says:

"We have for several years denied the contention that the failure to look and listen on approaching a railroad crossing was, as a matter of law, negligence, and have in recent years uniformly held that whether such failure was negligent was a question of fact, to be determined from all the facts and circumstances in the case."

In Chicago Union Traction Co. v. Jacobson, 217 Ill. 404, the court at page 407 says:

"He (the injured party in the cause under consideration) said that he knew the car (an electric car of the Chicago Union Traction Company) would have to stop or slow down or it would probably strike his wagon, and that the car could slow up just as well as he could with his team, and he thought the motorman could stop when the car was right close to the wagon. That testimony would justify the conclusion that appellee knew, when he drove upon the track, that a collision would be inevitable, in the ordinary operation of the car, unless the motorman of appellant should prevent the collision by his care and diligence. But appellee also testified that when he turned his team to cross the track the car was about one hundred feet east of Thirple street; that said street was about two hundred feet east of him, and that he thought he had time to get across the track. We cannot say that in so considering it the evidence necessarily led to but one conclusion, but we think that the question whether, under all the circumstances, appellee believed, upon reasonable grounds, that he had time to get across the track before the car would reach him, was proper to be submitted to the jury."

The evidence as to the speed of said team, where appellant's car was at the time appellee turned north to cross

appellant's track, the speed of said car, and as to where said collision took place, etc., being sharply conflicting, we are of the opinion and hold that it was a question of fact for the jury, as to whether or not appellee was in the exercise of ordinary care for his own safety just prior to and at the time of said collision, and that the verdict of the jury on that issue was not against the manifest weight of the evidence.

There is no contention that the evidence does not sustain the verdict of the jury as to the negligence of appellant. Three witnesses on the part of appellee, two other than appellee himself, testified that the motorman on appellant's car was not looking to the west down Missouri avenue prior to the time of the accident. The motorman did not testify, the evidence being to the effect that he had not been in the employ of appellant for some year and a half. The record clearly shows that appellant was guilty of the negligence charged in the declaration.

It is next contended by appellant that the court erred in refusing to give its instruction number 22. One instruction was given on behalf of appellee, being as to the measure of damages. Twenty-two instructions were given on behalf of appellant. The instructions given on behalf of appellant fully covered appellant's theory of the case, and while not in exactly the language of its refused instruction 22, the principles set forth in that instruction were covered by the other instructions given. The court therefore did not commit error in refusing this instruction.

While error was assigned to the effect that the verdict was excessive, this assignment of error was not argued in appellant's brief. It is therefore taken as waived.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Not to be Reported
Judgment affirmed.

Term No. 14.

Agenda No. 6.

57
In The
APPELLATE COURT OF ILLINOIS,
Fourth District

MARCH TERM, A. D. 1927.

FILED
MAR 14 1927
CLERK OF THE COURT
Fourth District of Illinois

L. E. CRAVENS,

Appellant,)

-vs-

OMER SLICHENMYER,

Appellee.)

245 I.A. 652 #3

) Appeal from the Circuit Court
) of Richland County.
)

OPINION by BOGGS, J.

This is an appeal prosecuted by appellant to reverse a judgment in bar of action and for costs, rendered against him in favor of appellee in the Circuit Court of Richland County at the November Term, 1926.

Rule 23 of this court requires a party bringing a cause here to file a complete, indexed abstract or abridgment of the record. The so-called abstract filed in this case wholly fails to comply with the requirements of said rule, as the evidence, instead of being abstracted, is set out in full. 56 pages of the record include the testimony in the case, that is, the questions, answers, objections, etc., whereas

the purported abstract of the testimony covers 77 pages. This is a clear violation of said rule. Schwitters v. Springer, 233 Ill. 432; Perkins v. Perkins, 158 App. 530. Under the holding of the Supreme Court in Schwitters v. Springer, supra, we would be justified, on our own motion, in striking said abstract from the files.

Notwithstanding the violation of said rules, as the record is not long, we have seen fit to examine the same.

One June 2, 1926, about 8 o'clock in the evening, appellant and one John Wachtell, citizens of Olney, Ill., went to a woods near the farm which appellee was farming, with 4 foxhounds, for the purpose, as appellant and Wachtell testified, of training said dogs. Shortly after arriving at their destination and after having turned said dogs loose, two of said dogs, one belonging to appellant and one to Wachtell, ran to the home of appellee and while there, appellant's dog was shot.

It is first contended by appellant that the verdict of the jury is against the manifest weight of the evidence. Appellant does not claim that he was present or that he saw what if anything transpired at the time his dog was shot, but insists that no damage was being done by the dogs and that appellee's father so stated shortly after the dog was shot.

The testimony on the part of appellee is to the effect that the dog in question and two other dogs ran into his chicken lot; that his wife was in the chicken house, at the time; that the dogs ran from there out into a lot where he had a sow with some small pigs; and that the sow was greatly disturbed by the dogs; that from the hog pens the dogs ran

the defendant's motion to the court to dismiss the case.
In the case of Smith v. Smith, 123 Ill. 123, 188 App. 230.
The holding of the Supreme Court in Smith v. Smith is
that, unless we would be justified, on our own action,
we cannot say that the defendant is liable.

Notwithstanding the violation of said rule, 22
the court is not law. We have seen it to examine the record.
On June 2, 1928, about 8 o'clock in the evening,
plaintiff and one John Washburn, citizens of Olney, Ill.,
went to a woods near the farm which appellee was farming, with
a purpose, for the purpose, as appellee and Washburn testi-
fied, of treating said dogs. Shortly after arriving at their
destination and after having turned said dogs loose, two of
the dogs, one of which was the dog of appellee, went
to the home of appellee and while there, appellee's dog was

It is first contended by appellee that the verdict
is against the manifest weight of the evidence.
Appellee does not claim that he was present at that he saw
that if anything transpired at the time his dog was shot, but
that no damage was being done by the dogs and that
appellee's father as stated shortly after the dog was shot.
The testimony on the part of appellee is to the
effect that the dog in question and two other dogs ran into
his chicken lot; that his wife was in the chicken house, at
the time; that the dogs ran over there and into lot where
he had a cow with some small pigs; and that as now was greatly
disturbed by the dogs; that from the hen house the dogs ran

toward him and while so doing, he shot and killed appellant's dog. In answer to the question, "When did you first discover the dogs?" appellee testified, "They were coming back past the house when I first saw them. I was down behind the barrel, holding the can under the faucet, transferring the kerosene. The first one I saw was the brown and white spotted dog, came right around the barrel and growled. I jumped out around the can and jumped behind the barrel. He began to growl and started around the barrel. He went immediately toward the chicken house; he went into the chicken yard and the hen house and then back through the lot he entered, and in the hog lot. My wife was in the chicken house at the time." Appellee, after testifying that he shot one of the dogs, then testified "This dog that I shot first began barking and growling, he ran out the lot and I walked on back to the drive and I saw a black and brown and white dog there in the hog lot. The old sow was making a big fuss because she had a bunch of little pigs there and she was disturbed."

The evidence on the part of appellee is also to the effect that this dog or a dog of similar appearance had been trespassing on his place and disturbing his chickens and stock for several months prior thereto. Appellee's father corroborated him in his testimony as to what occurred, and his father and certain other witnesses corroborated appellee with reference to the fact that a dog of similar appearance to the one shot, and other dogs, had been trespassing on appellee's premises and disturbing his stock and chickens. On the other hand, appellant testified that he had only had this dog a short while, some ten days or two weeks, and that during that

and his wife as being, he shot and killed appellant's
In answer to the question, "When did you first discover
they were coming back here
I first saw them. I was down behind the barn,
transferring the horses.
I saw the brown and white spotted dog, come
around the barn and growled. I jumped out through the
back fence behind the barn. He
went immediately toward the chicken
yard and the hen house and
went through the lot he entered and in the hog lot.
Appellant
was in the chicken house at the time. Appellant
then testified that he shot one of the dogs. Then testified
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and disturbing his stock and chickens. In the other
hand, appellant testified that he had only had this dog a
short while, some ten days or two weeks, and that during that

time he had kept him chained except on three occasions when he had him out for the purpose of training him.

We have read all of the testimony in the record, and are of the opinion that the verdict of the jury is not against the weight of the evidence. It is next contended by counsel for appellant that the Court erred in its ruling on the instructions.

Eight instructions were given on behalf of appellee. Three instructions were tendered by appellant, all of which were refused. The only observation counsel for appellant makes with reference to the rulings of the court on the instructions tendered by appellant, is as follows: "The instructions given for defendant should have been refused, upon which we have assigned error, the court erred in refusing to give the instructions of plaintiff, the verdict is contrary to the rules of law, and was not supported by the evidence."

Counsel for appellant having failed to point out or specify wherein it is alleged the court erred in its rulings on the instructions, It is not our duty or province to examine the same for the purpose of finding error on which to reverse the case. Wickes v. Walden, 228 Ill. 56-65; Devine v. Federal Life Ins. Co. 250 Ill. 203-212; 291 Ill. 34-39; Cooke v. C. O. & P. Ry. Co. 226 App. 73-83; Reichelt v. Anderson, 222 App. 176-179.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment Affirmed.

Not to be reported

We have read all of the testimony in the record.

and on the opinion that the verdict of the jury is not
against the weight of the evidence. It is not warranted by
the law that the Court error in its ruling on

Right instructions were given on behalf of appellant.

Instructions were given by appellant, all of which
were correct. The only exception claimed for appellant was
that the Court in its ruling on the instructions
was in error. The instructions given
are as follows: "The instructions given
should have been revised, upon which we have
no error, the Court error in refusing to give the in-
structions of plaintiff, the verdict is contrary to the

General for appellant or failed to advise

the Court; wherein it is alleged the Court error in
instruction. It is not our duty or province to examine
the same for the purpose of finding error on which to reverse
the same. Wicks v. Wicks, 228 Ill. 55-56; Wicks v. Wicks,
Life Ins. Co., 280 Ill. 503-512; 281 Ill. 54-55; Doyle v. C.
O. & N. Ry. Co., 226 App. 73-84; Wolchke v. Anderson, 228
Ill. 195-199

For the reasons above set forth, the judgment
of the trial court will be affirmed.

Very truly yours,
Attorney General

Term No. 16

Agenda No. 21

In The

APPELLATE COURT OF ILLINOIS,

Fourth District.

MARCH TERM, A. D. 1927
-----BRUNSWICK-BALKE-COLLENDER
COMPANY,

Appellee,

-vs-

H. L. WEBB,

Appellant.)

Appeal from
the
Franklin County
Circuit Court-----
OPINION by BOGGS, J.

An action in assumpsit was instituted by appellee against appellant in the circuit court of Franklin County to recover on thirty-two promissory notes of \$300 each; said notes being dated January 7th, 1925, the first one maturing January 7th, 1926, and the remaining notes maturing one each month for thirty-two months, beginning February 7th, 1926. Nothing was paid on any of the notes as they matured, and on September 3rd, eight of said notes were due and unpaid. Suit was instituted on said notes as above set forth, running to the September term, 1926.

The declaration filed in said cause is in the usual form, and is based on said eight above mentioned notes. With said declaration and notes was filed an affidavit of claim,

showing the amount due thereon, with attorney's fees, interest, etc., to be \$2,818.12. To said declaration, appellee filed a plea of the general issue and what purported to be an affidavit of merits. The affidavit of merits and the plea were stricken from the files, and judgment was rendered by the court in favor of appellee and against appellant for \$2,860.12. To reverse said judgment, this appeal is prosecuted.

The principal ground relied on by appellant for a reversal of said judgment is that the court erred in striking appellee's affidavit and plea from the files, and in rendering judgment nil dicet.

No bill of exceptions was filed by appellant, and only the common law record is before us for consideration. Motions and the rulings of the court thereon in actions at common law are not a part of the common law record, but must be preserved for review by bill of exceptions. Fanning v. Russell, 81 Ill. 398; Gaynor v. Hibernia Savings Bank, 166 Ill. 577; People v. Weston, 236 Ill. 104; Warren Jewelry Co. v. Kaul, 207 App. 134.

An inspection of the record discloses that the clerk, in writing up the common law record, purported to include therein the affidavit of merits filed by appellant, and the motions and rulings of the court thereon, with the exceptions of appellant to the ruling of the court on said motion. Said motions and exceptions cannot be made to appear in that manner. They can only be preserved by a bill of exceptions. Steffy v. People, 130 Ill. 98; Bruen v. People, 206 Ill. 417; People v. Moritz, 233 Ill. 494; People v. Faulkner, 248 Ill. 158-161; People v. Arnett, 317 Ill. 425. In the latter case, the court at page 426 says:

"Appellant has filed no bill of exceptions with the record. The common law record, only, has been filed. An exam-

ination of the record discloses that the clerk of the trial court has copied into the common law record the motion of appellees to set aside the order permitting the filing of the information, and to dismiss the petition therefor, together with the affidavits filed in support thereof. No certificate of the trial judge appears in connection therewith. It has been many times held by this court that motions of this character, made by the parties in a proceeding at law, and the rulings of the court thereon, are not parts of the common law record but must be preserved by bill of exceptions." Citing: People v. Weston, supra; People v. Glasgow, 301 Ill. 394; People v. Levin, 313 Ill. 588.

In the absence of a bill of exceptions, it is to be presumed that the ruling of the court in striking pleas and affidavits from the files is proper. Snell v. Trustees, etc., 58 Ill. 290; Gaddy v. McCleave, 59 Ill. 182; Reed v. Horne, 73 Ill. 598; Fanning v. Russell, supra; Gaynor v. Hibernia Savings Bank, supra.

It might be observed that, if we were in a position to consider the propriety of the ruling of the court in striking appellant's plea and purported affidavit of merits from the files, our examination of the same convinces us that the ruling of the court thereon was not erroneous. No defense to said notes on the merits is set up in said affidavit. The affidavit is to the effect that appellant would not have purchased certain billiard equipment from appellee and executed his notes therefor, except upon the promise of appellant, through its representative, made at the time, that they would not push the collection of said notes during the summer months.

If said alleged agreement not to push the collection of said notes according to their terms were based on a sufficient consideration, it is an agreement not in any way specified

in said notes, and could only be proved by extraneous evidence. That being true, the defense that the notes were not to be collected according to their terms would have to be set up by a plea in abatement, as such defense could not be made under the plea of the general issue. Bacon v. Schepflin, 185 Ill. 122.

In the latter case, the court at page 128 says:

"In cases where the agreement was merely to extend the time of payment, and suit was brought before the time of extension had passed, the cause of action had become complete, and the claimant was entitled to proceed, as his rights were fixed. In such case, he merely agrees to give a further day of payment and delay suit. The proof of such an agreement to extend the time of payment does not tend to show, that no cause of action ever existed; a cause of action, complete and matured, has existed, and the agreement to extend the time merely postpones the exercise of a remedy already completely vested. The proceeding in such a case is a dilatory one, seeking merely to delay the assertion of a right of action, and, as it is dilatory merely, it should be set up by plea in abatement, and not by plea in bar. In such a case, however, as the one at bar, there has never at any time been any cause of action; it is not certain, that any cause of action will ever arise, because the debtor may pay his obligation before the creditor acquires the right to demand payment." Citing: Archibald v. Argall, 53 Ill. 307; Culver v. Johnson, 80 Ill. 91.

It is also contended by appellant that the affidavit of merits accompanying plaintiff's declaration is not sufficient to warrant the judgment taken in this case. We have examined the affidavit and find it complies with the provisions of the statute, as construed by the supreme and appellate courts.

It might be further observed that an examination of the purported affidavit filed by appellant will disclose that

no sufficient consideration is set forth therein for an agreement not to enforce the payment of said notes when due. The law also is that the terms of a written contract cannot be varied by showing a contemporaneous oral agreement, setting aside or modifying its terms. Mumford v. Tolman, 157 Ill. 258; Murchie v. Peck Bros. & Co., 160 Ill. 175-178; Lanum v. Harrington, 267 Ill. 57-62; Graff v. Fox, 204 App. 598-603; Bradley v. Progressive Metal & Refining Co., 205 App. 552-554.

For the reasons above set forth, there being no record before us except the common law record, and there being no errors pointed out affecting it, the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported

Term No. 17.

Agenda No. 36.

In The
APPELLATE COURT OF ILLINOIS,
Fourth District.

MARCH TERM, A. D. 1927.

THE PEOPLE OF THE STATE
OF ILLINOIS

Defendant in Error

-vs-

JACOB HARRE

Plaintiff in Error

245 I.A. 652 #5

Writ of Error From
County Court of
Fayette County.

OPINION by BOGGS, J.

Plaintiff in error was indicted by the grand jury of Fayette County for the stealing of 6 goslings. The indictment consisted of three counts. The first count laid the property stolen in Mary Estes, the second count in William Estes and the third count in William and Mary Estes. The cause was certified to the county court, and on a trial in that court plaintiff in error was found guilty, and was sentenced to the county jail for one day and fined \$5 and costs. To reverse said judgment, this writ of error is prosecuted.

The first ground relied on for a reversal of said judgment is that the evidence is insufficient to support the verdict and judgment. The testimony on the part of the People was to the effect that on June 11, 1925, six goslings were missed from the Estes farm, which lies a short distance from the

residence of plaintiff in error. Fay Estes, a daughter of William and Mary Estes, testified to having tracked the goslings from the Estes premises to within a quarter of a mile of the residence of plaintiff in error, where she lost track of the same. She further testified that she could identify the goslings as belonging to her mother because one had a spot or mark on its neck, and for the further reason that they all came to her in the pen at plaintiff in error's place where they were confined, and that they followed her about the place at her home.

William Estes testified in effect that the only way he could identify the goslings was by the mark on the neck of one of them, and the way they followed his daughter around the place.

Mary Estes testified "I know they were ours by the spot on one's neck, and when the girl went to the pen (at the plaintiff in error's residence), she said, 'They are ours, by the spot on their neck.'..... They followed my daughter, but not me."

A search warrant was sued out and the goslings were taken from plaintiff in error's premises to the Estes home by Frank Stine, a constable. Stine testified among other things "We took the geese; there were 8 in the pen, and where they looked like they had been put in, they wanted to get out, and we let them out and they followed the little girl around the house."

Plaintiff in error testified in his own behalf "My folks raised some goslings that year. I could not say how many exactly. There were 11 in one bunch, but Mrs. Estes got 6. I paid no particular attention to our goslings. Never drove up 6 goslings belonging to somebody else." He further testified that in a conversation he had with William Estes after the goslings had been taken from his premises, he stopped Estes in the road and asked him if he would bring my goslings back

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if his came home. He said he would and he said that he had done wrong. These goslings would follow any woman or anybody if they thought they could get something to eat. They would follow my wife around. That is one reason she had to shut them up." He further testified that Estes told him that he had 16 goslings in the pen. A few days later I passed there and counted 22 head. I asked Estes where he got the balance and he said his wife hatched out some more. I really thought and believe that all the goslings we had there were ours."

Thurel Harre, daughter of plaintiff in error, testified: "The goslings in the pen were ours. They had been hatched out and raised there on the farm." James Harre, a son of plaintiff in error, testified: "Know our folks raised some goslings. They ran all over the place. I don't know the goslings were taken away. I had seen them before they were taken away, several days before."

If there were no other errors in the record the evidence on which this verdict and judgment is based is so conflicting and unsatisfactory we could not let it stand.

The court gave the following instruction: "Exclusive possession, shortly after the commission of a larceny or burglary, of stolen property, the proceeds of the crime, if unexplained, may of itself raise an inference of guilt of the person having possession, sufficient to authorize a conviction in the absence of any other evidence of facts or circumstances in evidence which leaves in the minds of the jury a reasonable doubt as to the guilt of such person."

While this instruction states a correct principle of law, the evidence on the part of the People did not warrant the



giving of the same, for the reason that plaintiff in error did not have that character of possession which the law contemplates is necessary in order to warrant a conviction on that ground.

People v. Mulvaney, 286 Ill. 114-119; People v. Kubulis, 298 Ill. 523-530; Watts v. People, 204 Ill. 233-245; People v. Sturdyvin, 306 Ill. 138-143.

In People v. Sturdyvin, *supra*, the court at page 143, says: "It is essential to raise an inference of guilt from the possession of stolen property that the possession is exclusive, in the sense that it is personal and inconsistent with an independent possession by others. If the property is in a place where others have access and rights as well as the defendant, as in a store or other open, public place, it is not sufficient." Citing: Watts v. People, *supra*; People v. Lardner, 296 Ill. 190.

In the case at bar, other members of plaintiff in error's family had equal access to the pen where the goslings were found, so that it cannot be said that plaintiff in error had the exclusive possession of them.

While the question is not specifically raised, the record discloses that there is no sufficient proof as to the value of the property alleged to have been stolen. The jury found the value of the property to be \$5. There is no evidence whatever on which to base this valuation. The only evidence in the record of any kind whatever as to the value of the property is the testimony of Mrs. Estes: "I would not have taken \$10 for them."

Whenever the measure or kind of punishment is dependent upon the value of the property stolen, the jury, or the court when the trial is by the court, must find this value as part of the verdict or finding, or a conviction cannot be sustained.

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People v. Ellison, 185 App. 287; People v. Tuhl, 211 App. 377;
People v. O'Dowd, 211 App. 402.

There being no competent evidence in the record as to the value of the property alleged to have been stolen, the verdict and judgment based thereon cannot stand.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and Remanded.

Not to be reported

Term No. 23

Agenda No. 9

In The
APPELLATE COURT OF ILLINOIS,
Fourth District.

MARCH TERM, A. D. 1927

245 I.A. 653#1

ED G. BURD and ORA KNUPP,)
Appellants,)

-vs-

IDA M. SADLER,)
Appellee.)

Appeal from the
Circuit Court of
Pulaski County.

OPINION by BOGGS, J.

This was a proceeding for partition, instituted by appellant Ora Knupp and her brother, Ed G. Burd, against appellee Ida M. Sadler in the circuit court of Pulaski County, to partition forty acres of real estate left by their mother, Fredonia Burd, who departed this life testate on August 6th, 1924.

The cause was referred to the master, who took the evidence and reported the same to the court, together with his conclusions of law and fact thereon. A decree for partition was entered, and commissioners were appointed, who reported said premises not susceptible of division. Said report was approved by the court, and a decree of sale was entered. The lands were sold by the master, and thereafter

a petition was filed by appellant, praying for an order of distribution.

An order of distribution was entered by the court, from which order appellant prayed an appeal to this court. Said appeal was granted, upon appellant filing an appeal bond of \$1,000 within thirty days, but the order granting the appeal failed to provide either that said bond be approved by the court or that it be approved by the clerk. The bond was filed within the time specified, but the record fails to show that the same was approved. A motion was made by appellee to dismiss the appeal, on the ground that the appeal had not been perfected, and this motion was taken with the case.

Counsel for appellant concedes that said bond was not approved, and seeks to have this Court approve the same, filing an affidavit for the purpose of qualifying the surety thereon.

The right to an appeal is a statutory right, as at common law there was no right to an appeal. Fairbanks v. Streeter, 142 Ill. 226-232; Keokuk & Hamilton Bridge Co. v. People, etc., 135 Ill. 276-279; Coal Belt Elec. Ry. Co. v. Kays, 207 Ill. 632-634; Bainstow v. New York Life Ins. Co., 143 App. 186-188.

Section 93 of the Practice Act provides: "The clerk of the court may, by order of the court, made at the time of praying the appeal, approve the security offered upon the bond, and such approval may be made in term time or vacation."

This power of the clerk is purely statutory. Bowlesville M. & M. Co. v. Pulling, 39 Ill. 53. In Sheppard-Strassheim Co. v. Nickas, 207 App. 370, the court, in discussing a question of this character at page 371, says:

"Inasmuch as this record contains no order of court

approving the bond, or authorizing the clerk to approve it, such as must be entered under either section 92 or 93 of the Practice Act, the appeal was not perfected, and must, in accordance with settled practice, be dismissed." Citing Phoenix Ins. Co. v. Hedrick, 69 App. 184.

In Phoenix Ins. Co. v. Hedrick, *supra*, the court at page 185 says:

"A defective bond, if approved and filed in apt time, may be amended; but if the bond, whether sufficient or insufficient, is approved or filed after the time fixed by the court, it is an absolute failure to perfect the appeal, which cannot be cured by an order nunc pro tunc or in any other manner. Dingler v. Strawn, 36 App. 563; Ettelson v. Jacobs, 40 Id. 427; Case v. Spiegel, 44 Id. 538.

"The order in this case as shown by the record is that the defendant should give bond within thirty days with security to be approved. This order confers no power upon the clerk to approve the bond, and the same must be approved by the court under the statute above referred to. But there is nothing in the record to show that the bond has been approved, either by the clerk or the court. Therefore no appeal to this court has been perfected.

"It is well settled by the decisions of the courts, that the Appellate Court may, of its own motion, dismiss an appeal when the same has not been perfected in accordance with the order of the trial court." Citing: Fanning v. Rogerson, 142 Ill. 478; Chicago Sash, Door & Blind Mfg. Co. v. Shaw, 39 App. 260; C. B. & Q. R. R. Co. v. Evans, 39 App. 261; Fardridge v. Morgenthau, 157 Ill. 395.

There is no statutory provision giving authority to this court to approve said appeal bond, and the motion to dismiss said appeal must therefore be allowed.

Inasmuch as the parties hereto have presented briefs and arguments on the merits of the case, we have examined the record and are of the opinion that, even though the appeal here sought to be made had been perfected, this case would have to be affirmed.

The finding and report of the master is based on the testimony of appellant and the contract entered into between appellant, her brother Ed G. Burd, and appellee. Said contract set forth that appellant was to pay appellee \$500, provided appellee did not prosecute a claim which she had against the estate of her mother. Appellant testified that appellee did not prosecute said claim, and so far as appellant's testimony is concerned, she is indebted to appellee in said amount, as found by the master.

Appellant failed to object or except to the master's findings, and is therefore under the law not entitled to object to or go behind the same in this court. Cheltenham Improvement Co. v. Whitehead, 128 Ill. 279; Gehrke v. Gehrke, 190 Ill. 186; Barney v. Comrs. of Lincoln Park, 203 Ill. 397. Objections and exceptions are prerequisites to review the findings of a master on questions of fact. Hurd v. Goodrich, 50 Ill. 450; Pennell v. Lamar Ins. Co., 73 Ill. 303; Singer, Nimick & Co. v. Steel, 125 Ill. 426; Ennesser v. Hudek, 169 Ill. 494; Marble v. Thomas, 178 Ill. 540.

Appellant did not appeal from the decree for partition or the decree of sale, but merely from the decree of distribution. The decree for distribution was based on a petition filed in the circuit court after the sale of said real estate had been made and approved. Said petition, filed by appellant, prayed for an order or decree of distribution, and further prayed that said sum of \$500 be not awarded to appellee out of the share of appellant. This was in direct conflict with

the findings of the master, which were not excepted to, and which were based on the testimony of appellant. The court therefore did not err in decreeing that appellee be paid said sum of \$500 out of the distributive share of appellant in the proceeds of the sale of said premises.

For the reasons above set forth, the appeal of appellant to this court will be dismissed.

Appeal dismissed.

Not to be reported

Appellate Court
Fourth District
March Term, A. D. 1927.

Annie Nugent, Executrix, etc.
Defendant in error

vs.

A. J. Francis, et. al.
Martin Grosby,
Plaintiff in Error.

Writ of Error to
St. Clair County.

Opinion by Higbee, J.

245 L.A. 653#2

This writ of error was sued out by Martin Grosby, plaintiff in error, to reverse a decree of the circuit court of St. Clair county entered in a suit for foreclosure brought by Annie Nugent, "executrix of the estate of Joseph Nugent, deceased", defendant in error, against plaintiff in error and Nettie R. Francis, A. J. Francis and others. It appears from the record that on April 19, 1918, the said A. J. Francis and Nettie R. Francis executed a mortgage or trust deed to Nathaniel C. McLean, trustee upon certain real estate to secure the payment of a note in the sum of \$35,000.00 payable to McLean as trustee. The trustee assigned these notes without recourse to Joseph Nugent, now deceased. On December 7, 1922, the said A. J. Francis entered into a written agreement with plaintiff in error wherein in exchange for other real estate he agreed to convey to plaintiff in error by warranty deed the real estate covered by the mortgage hereinbefore mentioned. In this agreement it was provided, that the \$35,000.00 mortgage herein involved should be assumed by plaintiff in error, the language used being as follows:

"An indebtedness of thirty-five thousand dollars (\$35,000.00) due in about four and one-half months the encumbrance to be assumed by the party of the first part."

Said party of the first part being said Martin Grosby." This agreement was signed by "Martin Grosby, by M. S. Platke his agent", and A. J. Francis.

245 I.A. 658

This writ of error was sued out by Martin Groody, plaintiff in error, to reverse a decree of the circuit court of St. Clair county entered in 1881 for the partition of the estate of Joseph A. Groody, deceased, brought by Anna Hagen, executrix of the estate of Joseph A. Groody, deceased, defendant in error, against plaintiff in error and Hattie B. Francis, A. J. Francis and others. It appears from the record that on April 19, 1818, the said A. J. Francis and Hattie B. Francis executed a mortgage or trust deed to Nathaniel G. Mahan, trustee, for the sum of \$10,000.00 payable to Mahan as trustee. The trustee assigned these notes to Joseph A. Groody, now deceased. On December 7, 1882, the said J. A. Groody assigned this mortgage to Anna Hagen, executrix of the estate of Joseph A. Groody, deceased. In that assignment it was provided, that the said Anna Hagen should not be bound by the terms of the mortgage in case of the death of the said Joseph A. Groody, deceased, but that the said Anna Hagen should be bound by the terms of the mortgage in case of the death of the said Joseph A. Groody, deceased. This assignment was made by the first party being said Martin Groody, and A. J. Francis.

The latter testified that the deed by himself and wife made pursuant to this agreement was at the request of plaintiff in error and ~~Platke~~ made to one Margaret Newman. The bill prayed that Margaret Newman be decreed to hold the lands involved as trustee for plaintiff in error and Platke; that plaintiff in error and Platke be decreed to be the owners of the mortgaged premises and that plaintiff in error, Platke, A. J. and Nette R. Francis and Margaret Newman be decreed to pay to defendants in error whatever amount upon an accounting appeared to be due upon the mortgage. Plaintiff in error Martin Grosby, M. S. Platke, and Margaret Newman did not appear or answer the bill and were defaulted. A decree was afterwards entered as prayed in the bill and in default of payment of the amount found due the premises were sold to said Annie Nugent for an amount \$10,459.29 less than the total debt, interest and costs. Upon report of sale by the Master in Chancery the same was approved and a decree entered against A. J. and Nettie R. Francis and plaintiff in error Grosby for the amount of this deficiency. It appears that A. J. Francis died testate on July 30, 1924. Plaintiff in error afterwards on March 31, 1925 filed a motion to vacate this deficiency judgment. Upon the hearing of this motion the court entered a further decree finding among other things that plaintiff in error agreed with A. J. Francis and Nettie Francis to assume and pay the mortgage indebtedness, but that there were certain equities between them yet undetermined and the deficiency judgment was vacated and a new judgment entered against plaintiff in error, the estate of A. J. Francis deceased, and Nettie R. Francis, for the deficiency, and further directing that in the event either the estate of A. J. Francis or the said Nettie R. Francis or both of them should pay the said deficiency judgment or any portion thereof that "they or either of them" should be decreed a judgment against plaintiff in error for the amount of money so paid.

Plaintiff in error contends that it was error for the court to enter any deficiency judgment against him. This contention is predicated upon a line of decisions of the courts of this state that a recital in a deed to the effect that the grantee assumes certain mortgage indebtedness is not sufficient upon which to base a deficiency judgment for a portion

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of that mortgage indebtedness against the grantee, in the absence of some showing that the deed was delivered to the grantee and accepted by him, or some further showing that he agreed to assume the mortgage indebtedness. In this case however, the contract introduced in evidence, expressly provided that the mortgage indebtedness of \$35,000.00 should be assumed by plaintiff in error Martin Grosby. A. J. Francis testified on the hearing before the Master in Chancery that the premises were conveyed in accordance with the contract; that the deed was made to Margaret Newman by direction of Martin Grosby and Flatke; that a part of the consideration for the deed was the assumption of the mortgage for \$35000.00. The record of the deed itself was also introduced in evidence. The facts appear to us to clearly show the assumption of the \$35,000.00 indebtedness by plaintiff in error Grosby and to ^{have} warrant^{ed} the Chancellor in finding a deficiency decree against him. (Thompson v. Dearborn 107 Ill. 87.) Plaintiff in error contends that even though there was a sufficient showing upon which to base a deficiency judgment there are no allegations in the bill to support such proof. It is expressly alleged in the bill that the agreement was executed and that plaintiff in error therein assumed to pay the indebtedness and further the agreement is attached to the bill as Exhibit "D".

Plaintiff in error assigns as error and contends in his argument that the court below erred in entering a deficiency judgment against the "estate of A. J. Francis, deceased" . No error has been assigned by those interested in this estate and as plaintiff in error can not be interested in or affected by this provision of the decree, ^{it} cannot be properly considered by us here. Complaint is also made by plaintiff in error that the trustee in the mortgage, Nathaniel C. McLean was not made party to this suit but as this trustee had parted with all his interest in the mortgage and notes, he was not a necessary party. The decree is sustained by the proof in the record and will be affirmed.

Not to be reported AFFIRMED.

[illegible]

CASE STUDY

That is the question

Term No. 33

Agenda No. 35.

Appellant Court
Fourth District
March Term, A. D. 1927.

Peter P. Schaefer,

Appellee

vs.

Frank Koch,

Appellant.

Appeal from Clinton.

245 I.A. 653 #3

Opinion by Higbee, J.

Frank Koch, appellant, has prosecuted this appeal from a judgment entered against him in the circuit court of Clinton County in the sum of \$169.48 and in favor of Peter P. Schaefer, appellee. On February 12, 1926, appellee sold to appellant 14 hogs at 13 cents per pound. These hogs were at appellee's farm about eight miles north of Carlyle. Under the contract of sale appellant was to take the hogs at the farm. He did make an attempt to haul the hogs in his truck but the roads were in such condition that he could not. The contract for the hogs was verbal, but appellee gave to appellant a written order on his tenant to deliver them to appellant. Appellee lives in Champaign and appellant in Beckmire, Illinois. There is no dispute about the original contract of sale. Appellee having been notified that appellant had not yet gotten the hogs, wrote him on February 19 urging him to take them. He wrote him again under date of February 25 and advised him that the hogs were being kept at his risk. On March 2 appellant wrote appellee that he had been up to take the hogs but was unable to do so and would have to wait until the roads were in suitable condition which would probably be two or three weeks, but denied that the hogs were his. On March 3 and 4 appellee again wrote appellant and offered to pay one-half the price for the hauling of the hogs if appellant would take them at once. On March 4 appellant wrote appellee that the hogs belonged to him (appellee) and that if he didn't want to haul

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them to Carlyle he could do as he pleased with them. Appellee again wrote on March 8 and 10 insisting that the original agreement between them should stand, but made appellant another proposition including the sale of six additional hogs, expressly stating however that this proposal was not to be understood as affecting the original contract, unless accepted. On March 11, appellant wrote that he would accept the twenty hogs but not upon the same conditions proposed in appellee's letter. Appellee wrote several other letters containing proposals for an adjustment of the matter but uniformly insisting that the old contract of sale should stand unless another agreement was reached. He finally wrote that unless appellant took the 14 hogs he would sell them on the market and hold him for the loss. Appellant did not take the hogs, so they were sold on the market by appellee and this suit was brought by appellee to recover this loss. Upon the trial the court on motion of appellee gave a peremptory instruction directing the jury to find the issues for appellee and assess his damages at \$169.48. The jury returned a verdict in accordance with the court's instructions and judgement was afterwards entered against appellant for the amount named in the verdict.

Appellant contends that the sale is one governed by the Uniform Sales Act of this state; that the value of the hogs sold was more than \$500, and therefore the contract should have been in writing. The evidence does not show that at the time the sale was agreed upon, the sale value of the hogs would have amounted to \$500. The exact weight at that time was not known, but appellee's tenant Huddleston estimated the weight of the hogs at the time of the sale ~~and if he~~ ^{and if he} in his testimony, ^{and if he} was correct ^{and if he} his estimate, the total value of the hogs at the price agreed upon would not have amounted to \$500.

While it is true that when the hogs were sold, they had increased materially in weight, so that at the price agreed upon they brought far more than \$500, but the amount involved at the time the contract was made must govern. Appellant did not on the trial deny the making of the contract. Even if a written contract were necessary it is our opinion that appellant's letter to appellee of March 2, 1926 was sufficient evidence of the contract to meet the requirement of the Uniform Sales Act. That letter was as follows:

[illegible]

"Answer your letter Feb. 25. I was up to get the hogs March 2nd, and your swamp isn't fit to get in. While you don't want to help to get them out you will have to wait until the roads will be fit to get in. It will take two or three weeks and when the roads get fit I will get them. I am not responsible for them for they are your property."

It was in answer to a letter written by appellee to appellant dated February 25, 1926, in which appellee states "Mr. Huddleston writes me that you have not been up yet for the 14 hogs I sold you on February 12." The fact that appellant uses words at the end of his letter which do not seem to be fully in accord with the contract, does not prevent the letter from being a note or memorandum of the sale. (Meyer v. Hirsch 212 Ill. App. 441. Alles v. Northwest Side Lumber Co. 239 id. 623).

The only other contention made by appellant is that the letters show there was a subsequent contract consummated for the sale by appellee to appellant of 20 hogs to be delivered by appellee and that the evidence shows he did not comply with this contract. Appellant filed an offset of \$125.00 for damages which he claims to have sustained because of appellee's failure to deliver the twenty hogs. The trial court however refused to admit this testimony and instructed the jury to find for appellee. Each and everyone of appellee's letters introduced in evidence referring to the sale of the six additional hogs stated that it would be made upon an expressed condition that his proposal be accepted by appellant and that unless the proposal was so accepted the original contract for the sale of fourteen hogs must stand. Appellant never agreed to the conditions of appellee's proposal for the sale of the six additional hogs and the court did not err in excluding this testimony. The facts in proof sustain the action of the trial court in directing the verdict for appellee and the judgment should be and is affirmed.

JUDGMENT AFFIRMED.

Not to be reported

Appellate Court
Fourth District
March Term 1927.

Manufacturers Finance Trust,
Appellant,

vs.

Thomas F. Stone, Appellee.

Appeal from City Court
of East St. Louis.

Opinion by Higbee, J.

245 I.A. 653 #4

This is a suit in replevin instituted by appellant to recover from appellee possession of a Flint touring automobile, in the city court of East St. Louis, Illinois. It appears from the evidence that appellee bought the automobile in question from the Griesedieck Automotive Service Company of said City. A witness for appellant testified that the cash price for this automobile was \$1495.00 and the price if purchased on time was \$1578.00, a difference of \$83.00 which constituted the "finance charge" and included insurance, interest and filing. W. F. Griesedieck, the agent who sold the car to appellee, testified that there were some extras which brought the sale price up to \$1529.00; that appellee paid him \$929.00 in cash; that he took a note from him for \$683.00 which included the \$600.00 due on the car and \$83.00 for "carrying charges", which were the charges made by the finance company which took over the note. The note for \$683.00 was payable in installments, one installment of \$67.10 being payable one month after the date of the note, June 10, 1924, and the other installment for \$56.90 each, payable each month thereafter for eleven months. To secure the payment of this note, ^{appellee} executed a chattel mortgage. The chattel mortgage and note were both assigned to appellant. It seems that by mistake appellee paid \$57.90 on each installment until the last installment amounted to only \$46.10 instead of \$56.90. A dispute having arisen over this last payment appellant replevined the car in question and a trial followed. At ^{the} close of appellant's ^{Evidence} testimony the court upon motion of appellee gave a peremptory instruction to the jury to find the issues for appellee, which was done and appellee's damages were then assessed at \$1670.00. Upon a motion for new trial the court

Appellate Court
1917
No. 1000

WILLIAMSON vs. WILSON
1917

Special Term City Court
No. 1000

WILLIAMSON vs. WILSON

2451A. 688

This is a bill in equity to enforce the payment of a debt. The plaintiff, William Williamson, alleges that the defendant, John Wilson, owes him the sum of \$100.00. The plaintiff claims that the defendant has failed to pay the debt for a period of six months. The plaintiff seeks a judgment for the amount of the debt, with interest and costs. The defendant denies the plaintiff's allegations and claims that the debt has been paid. The plaintiff has filed a bill of particulars, which sets out the details of the debt. The defendant has filed a motion to dismiss the bill, claiming that the plaintiff has failed to state a claim. The court has denied the motion to dismiss. The case is set for trial on the 15th day of the next month. The plaintiff has the burden of proving the debt. The defendant has the burden of proving that the debt has been paid. The court will hear the evidence and make a decision. The parties are advised that the court may award costs to the prevailing party. The parties are also advised that the court may grant a new trial if the verdict is against the weight of the evidence. The parties are advised that the court may grant summary judgment if the facts are undisputed. The parties are advised that the court may grant a judgment of acquittal if the evidence is insufficient to support the verdict. The parties are advised that the court may grant a judgment of conviction if the evidence is sufficient to support the verdict. The parties are advised that the court may grant a judgment of acquittal if the evidence is insufficient to support the verdict. The parties are advised that the court may grant a judgment of conviction if the evidence is sufficient to support the verdict.

required appellee to enter a remittur of \$1370.00 and gave judgment on the verdict for \$300.00 and ordered a writ of retorno habendo. This appeal resulted. The peremptory instruction was given in favor of appellee upon the theory that appellant had not shown a compliance with section 18 of the practice act which requires the assignee of a chose in action, not negotiable, in order to sue in his own name to state in his pleading ~~on oath~~, or by affidavit where pleading is not required, that he is the actual bona fide owner thereof and set forth how and when he acquired title. That section was enacted for the sole purpose of giving to the assignee of a non-negotiable chose in action the right to sue thereon in his own name in cases where he would not have had that right before. In the case of Barbour vs. White 37 Ill., page 164 the Supreme Court held that the assignee of a chattel mortgage has the right to institute a suit in replevin for recovery of property covered by the mortgage. This court in Robinson v. Buschle 235 App. 519 also expressly held that where a chattel mortgage has been assigned the right of action to recover the property involved therein is in the assignee. That being true, section 18 of the Practice Act has no application to this case and it was error for the court to give the peremptory instruction.

Appellee ~~further~~ contends that the note involved was usurious. This contention is based upon the fact that the price of the automobile when sold upon the installment plan was \$83.00 more than the cash price, it being claimed that this excess payment of \$83.00 was really interest and amounted to more than the 7% allowed by law. There was evidence to the effect that the \$83.00 in question included "insurance and filing" as well as interest ^{and} it was not clearly shown what part, if any, of the \$83.00 was claimed to be usurious. This transaction would seem to be governed by the rule stated in 20 L.R.A (New Series) 120, as follows:

"The cases are generally uniform in holding that there may be a cash and an increased credit price, and that a bona fide sale for the latter is not usurious, irrespective of whether it is made up of the cash price plus a rate of increase, which would exceed the legal rate, or whether a note is given and the increase put in the form of interest thereon."

It was error for the trial court to give the peremptory instruction to the jury to find the issues for the appellee, and the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

not to be reported

The appellant appeals to the court to set aside the judgment of the trial court and to give judgment in favor of the appellee. The appellant claims that the trial court erred in its judgment in awarding the cash price of the automobile to the appellee. The appellant claims that the trial court erred in its judgment in awarding the cash price of the automobile to the appellee. The appellant claims that the trial court erred in its judgment in awarding the cash price of the automobile to the appellee.

Term No. 11.

Agenda No. 26.

Appellate Court of Illinois
Fourth District
March Term, 1927.

Samuel W. Baxter,
administrator of the
Estate of George W. Derlam,
deceased,
Plaintiff in Error,

vs.

East St. Louis & Suburban
Railway Co., a Corporation,
Defendant in Error.

FILED
245 I.A. 653 #5
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Writ of Error to
Circuit Court,
St. Clair County.

Opinion by Higbee, J.

Samuel W. Baxter, administrator of the estate of George W. Derlam, deceased, plaintiff in error, brought this action to recover damages for the death of his ^{unstable} ~~deceased~~ resulting from a collision of an interurban car owned by the East St. Louis and Suburban Railroad Company, defendant in error, with an automobile being driven by the deceased on a highway or street leading from the city of East St. Louis to the City of Belleville. At the close of plaintiff in error's evidence the court directed the jury to return a verdict in favor of defendant in error. This was done and upon the verdict so returned the court entered judgment against plaintiff in error for costs and ordered that execution issue for same. To reverse that judgment this writ of error has been sued out. Upon motion of defendant in error, supported by affidavit, the bill of exceptions herein was stricken from the records of this court, on the ground that it did not appear to be filed with the clerk of the trial court within the required period. Plaintiff in error has filed a motion also supported by affidavit to vacate the order striking the bill of exceptions from the record. Upon consideration of the affidavit in support of plaintiff in error's motion to vacate our former order in connection with the files in the case we have decided to allow this motion and to consider the case upon its merits. The declaration consists of two counts. The first count alleges that

while plaintiff in error, exercising due care and caution for his own safety was driving an automobile along a public street of said city of Belleville near one of the tracks over which defendant in error operated interurban cars, defendant in error so carelessly, negligently and improperly drove and managed one of its said cars that it ran into and struck with great force and violence said automobile in which the deceased was then riding, and thereby killed him. The second count charges substantially the same negligence except that it ^{states} ~~is charged~~ defendant in error ~~with~~ ^{has} operating the motor car in a willful, wanton and improper manner. The accident occurred on September 9, 1922, between Belleville and East St. Louis. The evidence does not clearly show whether it occurred within the city limits, but it seems to be taken for granted by both parties that it did occur within the corporate limits of Belleville and upon what is known as West Main Street of that city. It clearly appears from exhibits in evidence that the accident did not occur within either the business section or the closely built-up residence section of Belleville. The view in both directions from where the accident occurred is unobstructed for some distance. Plaintiffs in error's two tracks are located in the center of the street, and on each side of these tracks there is a concrete slab 24 feet wide for traffic of other vehicles. There is a space between plaintiff in error's tracks and the inner edge of this concrete slab of some two feet filled with chat. At the time of the accident deceased ~~was~~ ^{with} three other persons, ~~each~~ traveling in the automobile in question from East St. Louis toward Belleville and defendant in error's interurban car ~~street car~~ was traveling in the same direction. At the ~~place~~ ^{place} of the accident there is a considerable grade for some distance, and both the street car and the automobile were traveling down this grade. It appeared that ~~two~~ ^{three} of the ~~other~~ occupants of the car were killed. Plaintiff in error introduced in his behalf two witnesses who were upon the street car, the surviving occupant of the automobile and the owner of a garage in front of whose place the accident occurred, who witnessed the accident. He also placed on the witness stand the mother of the deceased, and a photographer. From the evidence it clearly appears that the only other vehicle in sight

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at the time of the accident was a truck in front of the automobile, traveling in the same direction. The deceased who was driving the automobile signalled the driver of the truck that he desired to pass him. The truck pulled to the right and it was stated by all the eye witnesses that there was sufficient space for the automobile to pass through to the left of the truck without getting off of the concrete slab. The deceased however, in passing the truck swerved as far to his left that he got off the concrete and onto the chat, between the slab and defendant in error's tracks. The witness who was in the automobile at the time testified that the street car hit the automobile just as they were passing the truck. Another witness testified that the automobile was probably ten feet past the truck when the car hit it. One of appellee's witness, Sylvester Funk, who was at the time riding on the street car testified, that he saw the automobile turn over to the car track when it caught up to the truck and that almost in a flash it was struck. The witnesses varied as to the speed at which the street car was traveling, estimating the same at from 30 to 45 miles an hour.

There was no substantial contradiction in the evidence and we are of the opinion, it clearly shows that deceased who was driving the automobile was guilty of contributory negligence. There was nothing that required him to pull off of the concrete slab and on to the chat next to defendant in error's tracks. It is the well established rule of law that if ~~plaintiff in error's deceased~~ ^{on the part of the deceased} went of ordinary care, contributed to the injury plaintiff cannot recover. If the evidence of the deceased's contributory negligence is clear and indisputable then it was the duty of the trial court to direct the jury to find for defendant in error.

(Hohen v. C.P.St.L. Ry. Co. 152 Ill. 293, Thoissell v. Chicago City Ry. 82 Ill. App. 375;). Under these authorities and many others to the same effect the trial court would have been justified upon this ground alone in giving the peremptory instruction. However, we are also of the opinion that the evidence failed to show that defendant in error was guilty of any negligence which contributed to the accident. It seems to be assumed in the argument of plaintiff in error that the street car was being driven in

excess of the rate provided by the ordinance of the City of Belleville, but no such ordinance was introduced in evidence nor was there any evidence though it was assumed to be the fact, that the accident actually occurred within the limits of Belleville. The motorman had the right to assume that the deceased would remain upon the concrete pavement, and he was not required to anticipate that deceased would turn in front of the motor car. (Chicago City Ry. Co. v. Ahler 107 Ill. App. 397).

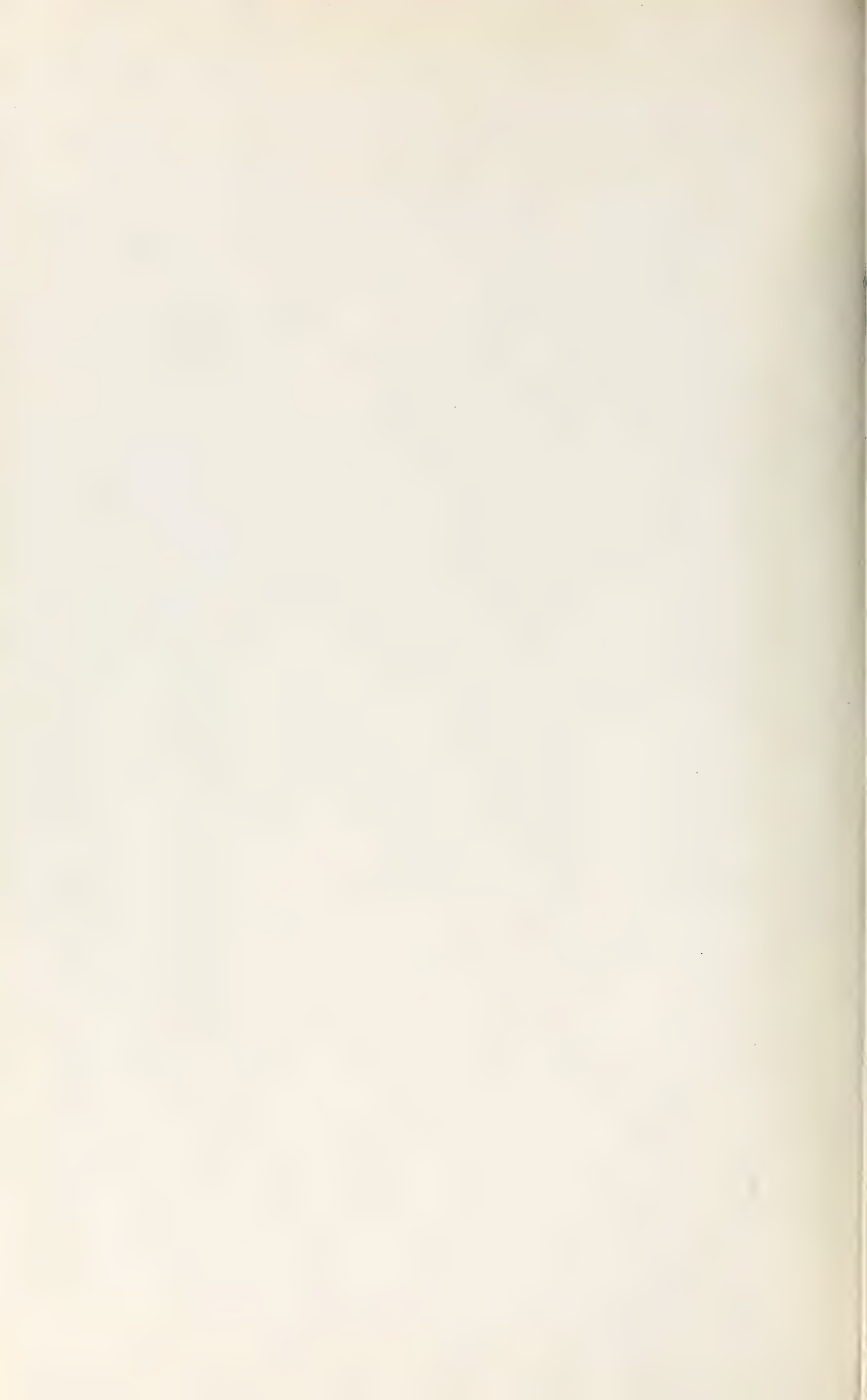
It is also claimed by plaintiff in error that the trial court erred in awarding an execution against him for costs. Since this suit was brought by plaintiff in error as administrator the judgment should of course have been for costs to be paid in due course of administration. There is nothing to indicate that this was called to the attention of the trial court, and an opportunity given to correct the error and direct the costs to be paid in due course of administration. Under these circumstances this court has the right to modify the judgment in that respect and render final judgment here, as was done in Jones v. I. C. R.R. Co. 106 ^{Ill.} App. 597).

It is therefore ordered and adjudged by this court that the defendant in error, East St. Louis and Suburban Railway Company have and recover of and from plaintiff in error, Samuel W. Baxter, administrator of the estate of George W. Derlam, deceased, all the costs and charges by said defendant in error, in this behalf expended to be paid by said plaintiff in error in due course of administration of said estate and that this judgment be duly entered upon the records of this court. It is further ordered that the clerk of this court certify a copy of this judgment to the clerk of the circuit court of St. Clair county.

The judgment of the circuit court of St. Clair county as herein modified is affirmed.

AFFIRMED.









Ill. Unpublished opinion

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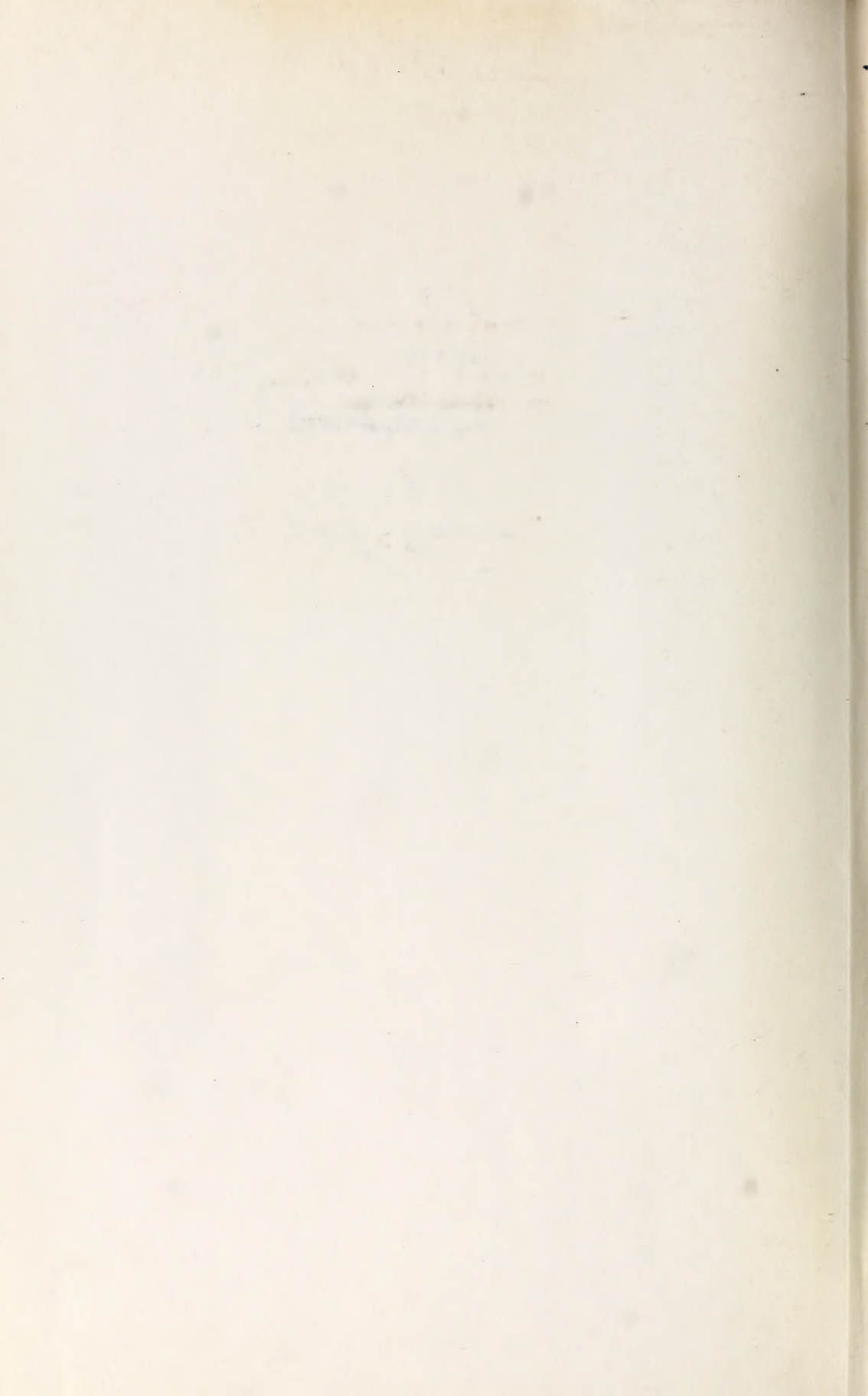
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